

## Tilburg University

### Statement of the European Law Institute on Collective Redress and Competition Damages Claims

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Statement of  
the European Law Institute  
on  
**Collective Redress and  
Competition Damages Claims**

# The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, the ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such its work covers all branches of the law: substantive and procedural; private and public.

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## **ACKNOWLEDGEMENT**

Following the publication of the European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), and of the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM (2013) 404 final) published on the same date, an ELI Project Team, assisted by an Advisory Committee, considered the Recommendation and the Proposal for a Directive and prepared comments upon it. The results of the Project Team's analysis are presented in this Statement.

Both the Project Team and the Advisory Committee consisted of members of the judiciary, legal practitioners and academics from a broad range of legal traditions. This Statement does not however necessarily reflect the position of all members of the Team.

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## INTRODUCTION

On 11 June 2013, the European Commission issued a non-binding Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

On the same date, the European Commission issued the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013) 404 final). The Directive was adopted by the European Parliament on 17 April 2014 and by the Council on 10 November 2014.

The outcome of the ELI Project on Collective Redress and Competition Damages Claims is the present Statement on Collective Redress and Competition Damages Claims, structured in two sections. Section I is an assessment of the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) which identifies its implications for Member States and suggests practical measures that will contribute to its coherent implementation. Section II contains an assessment of the European Commission's Proposal for a Directive in the light of its practical implications for damages claims in national courts and for the effectiveness of competition damages claims.

## **SECTION I**

Assessment of the  
European Commission Recommendation  
of 11 June 2013 on common principles for  
injunctive and compensatory collective  
redress mechanisms in the Member States  
concerning violations of rights granted under  
Union Law  
(2013/396/EU)

## INTRODUCTION

In June 2013 the European Commission finally published its long-awaited policy on collective redress. The documents included separate proposals and recommendations for EU competition law and for the violation of rights granted under European Union law generally. Regarding the latter, the main item was a Recommendation “on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”<sup>1</sup> (the “Recommendation”), which was accompanied by a Communication to the European Parliament and the Council “Towards a European Horizontal Framework for Collective Redress”<sup>2</sup>. Regarding competition law, the Commission proposed a directive “on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”<sup>3</sup> (“Directive”). This Directive, finally adopted in November 2014, was accompanied by an impact assessment<sup>4</sup> and a Communication on quantifying harm in competition cases<sup>5</sup>.

The documents were the final result of a long and very controversial debate on the reform of the European system of enforcement of consumer rights and the rights of tort victims in mass harm situations. Although the result is disappointing for those who had hoped for a binding European framework of collective redress instruments<sup>6</sup>, it had been clear for some time that the current political situation would not allow a directive or regulation which would impose any obligation on the Member States to implement new instruments for the collective enforcement of damages claims. Therefore it did not come as a surprise that the Commission’s documents were rather cautious. Neither the Directive nor the Recommendation will oblige the Member States to reform their existing systems fundamentally<sup>7</sup>.

A brief review of the debate at the European level reveals the extent of the controversy relating to collective redress both in the Member States and within the Commission. With respect to competition law, DG Competition from the outset clearly favoured stronger instruments of private enforcement following the example of US class actions, relying to a large extent on the “Ashurst

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<sup>1</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU), OJEU, L 201/60, 26.7.2013).

<sup>2</sup> COM (2013) 401/2.

<sup>3</sup> COM (2013) 404 final; approved Directive 2014/104/EU of 26 November 2014.

<sup>4</sup> SWD (2013) 203 final.

<sup>5</sup> COM (2013) 3440.

<sup>6</sup> See especially Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final, INT 708, 10.12.2013.

<sup>7</sup> For more detailed reviews of the Commissions documents see C. Hodges, “Collective Redress: A Breakthrough or a Damp Squib?”, *Journal of Consumer Policy*, vol. 67, 2014, p. 67; A. Stadler, “Die Vorschläge der Europäischen Kommission zum kollektiven Rechtsschutz in Europa – Der Abschied von einem kohärenten europäischen Lösungsansatz?”, *Zeitschrift für Gemeinschaftsprivatrecht*, vol. 10 no. 5, 2013, p. 281.

Study” of 2004<sup>8</sup>. This stance resulted in a Green Paper in 2005<sup>9</sup>, a White Paper in 2008<sup>10</sup>, and an internal proposal for a regulation (which never appeared in public), which prompted a wave of strong resistance from the business sector all over Europe, particularly in Germany and France. DG Competition’s initiative supported rather uncritically the idea that private enforcement would be a more efficient instrument in antitrust cases than public enforcement, notwithstanding the lack of empirical data on and sufficient research into the respective merits of public and private enforcement in Europe. Therefore there is considerable weight in the argument that class actions—which were developed in a completely different legal system, namely the United States—should not simply be copied in Europe<sup>11</sup>. Unfortunately the Commission passed up the opportunity to develop a new European form of group action which would better harmonise with European traditions and would be able to avoid the negative implications of class actions, such as the encouragement of a claims culture and the blackmailing of defendant companies by unmeritorious but expensive mass claims.

DG Sanco for various reasons was more cautious when it published its Green Paper on collective redress for consumers in 2008<sup>12</sup>, but that was not enough to quieten the strong opposition to collective redress, particularly in the form of opt-out group actions. Consequently, in advance of the re-election of José Manuel Barroso as President of the European Commission in 2009, some Member States took the opportunity to wrest from him the concession not to implement opt-out group or class actions in Europe<sup>13</sup>. As a result, the Barroso II Commission launched a public consultation towards “a more coherent approach to collective redress” in February 2011<sup>14</sup>, with the intention of establishing a common basis for further action. The response to the public consultation was overwhelming in terms of the number of statements filed, but the positions taken by respondents again varied considerably<sup>15</sup>. Finally, as a reaction to the consultation, the European Parliament published a Resolution in 2012<sup>16</sup> in which it called upon the Commission to take into consideration the potential for misuse of collective redress instruments and to provide sufficient safeguards against such misuse. The Resolution also stressed the need for effective instruments of alternative dispute resolution (ADR), but pointed out that ADR mechanisms cannot provide sufficient protection for consumer rights unless there is some pressure on the business sector to adopt such mechanisms and

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<sup>88</sup> D. Waelbroeck, D. Slater and G. Even-Shoshan, *Study on the condition of claims for damages in case of infringement of EC competition rules*, Brussels, Ashurst, 2004.

<sup>9</sup> COM (2005) 672.

<sup>10</sup> White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165.

<sup>11</sup> Particularly in Germany the opposition was and still is quite strong: cf. A. Bruns, “Einheitlicher kollektiver Rechtsschutz in Europa”, *Zeitschrift für Zivilprozess* vol. 125, 2012, p. 399 with further references; H. Willems, in Chr. Brömmelmeyer (ed.), *Die EU-Sammelklage, - Status und Perspektiven*; Frankfurter Institut für das Recht der Europäischen Union, 2013, p. 17.

<sup>12</sup> Green Paper on Consumer Collective Redress, COM (2008) 794.

<sup>13</sup> *Frankfurter Allgemeine Zeitung*, 20.10.2009 (“Barroso verheddert sich im Sammelklage-Dickicht”); *Frankfurter Allgemeine Zeitung* 26.10.2009 (“Kroes scheitert mit Kollektivklage”); *Financial Times*, 3 October 2009.

<sup>14</sup> COM SEC (2011) 173.

<sup>15</sup> Cf. the study by B. Hess and Th. Pfeiffer, *Evaluation of contributions to the public consultation and hearing: “Towards a Coherent European Approach to Collective Redress”* (Study JUST/2010/JCIV/CT/0027/A4), Ruprecht-Karls-Universität Heidelberg.

<sup>16</sup> Resolution of the European Parliament (2 February 2012) 2011/2089(INI). For detailed discussion of the position of the European Parliament, see Hodges, fn. 9.

to make them available to consumers. In reality, it takes both the availability of ADR instruments to consumers, and – as a last resort – procedural mechanisms allowing the enforcement of mass claims, to deal with the problem of defendants who refuse to cooperate in the settlement of claims<sup>17</sup>. Nevertheless, it is also clear that the development of European instruments of collective redress faces a dilemma: how to provide efficient mechanisms allowing the enforcement of even small and minor damages claims while at the same time avoiding the misuse of the mechanisms developed. The Commission's Recommendation is an attempt to balance these diverging interests. It is a compromise based on the realistic estimation that for political reasons nothing else would have been possible within the remaining time in office of the Barroso II Commission<sup>18</sup>.

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<sup>17</sup> See Recommendation, points 25-28: Collective alternative dispute resolution and settlements.

<sup>18</sup> This introductory section is substantially based on A. Stadler, "The Commission's Recommendation on common principles of collective redress and private international law issues", *Nederlands Internationaal Privaatrecht*, vol. 4, 2013, p. 483.

## EXECUTIVE SUMMARY

The key issues identified by the ELI are:

- a) the structure of collective redress actions – whether opt-in or opt-out;
- b) the criteria for recognition or admissibility/certification of a representative body to bring an action on behalf of a class or collective group;
- c) the permitted methods of funding collective redress actions;
- d) the cost rules to be applied to collective redress actions;
- e) collective alternative dispute resolution (ADR) for class and representative actions;
- f) cross-border collective redress.

The views of the ELI on these issues may be summarised as follows:

a) Opt-in or opt-out?

From the ELI's perspective, the main objective should be to work towards a solution that will make collective redress in Europe effective in mass harm cases. The ELI recognises that, at the moment, it would be very difficult to achieve a consensus at EU level in favour of either opt-in or opt-out. If a principle is to be adopted at EU level, the only viable option seems to be that national courts in the Member States should be given full discretion to select the appropriate structure for collective redress claims on a case by case basis.

The ELI considers that the principled preference for opt-in collective redress expressed in the Recommendation is problematic for reasons explained in the text below. The ELI calls upon the European Commission to study the varying developments of national law and practice currently taking place in order to produce a report based on the empirical evidence available in 2017, when the Recommendation is due to be reviewed.

b) Criteria for recognition of representative bodies

The ELI considers that similar requirements as apply under point 4 of the Recommendation to the advance designation of representative entities by Member States should apply to the certification of representative entities by national authorities or courts on an ad hoc basis (for the purposes of a particular representative claim).

The Recommendation recognises that courts should play a key role in the ad hoc certification of entities (recital 21). This requires Member States and the EU to set up training programs for judges who will be dealing with mass claims and collective actions, bearing in mind that the case management of mass disputes differs from the case management of ordinary claims. Ideally the EU should facilitate uniform judicial case



management training programs at EU level to handle collective redress actions via the European Judicial Network.

National rules should clearly distinguish between the formal certification of an action filed as a necessary requirement for collective redress proceedings and summary judgment on the merits of the case in the early stages of the litigation. If Member States allow an early dismissal of the action on the merits they should do so only on the basis of clearly defined and strictly limited criteria and should not generally accord such decisions *res judicata* effect.

c) Funding

As a safeguard for claimants, national rules should provide that, if the claimant party is required to declare the origin of its funding, it should do so to the court only. The information provided should not be made available to the defendant.

Member States should in any case ensure that private third party funders do not misuse their position and do not improperly influence procedural decisions made by the claimant party, especially if the claimants are consumers. Judges should be requested to take into account the possible influence of private third party funders when considering whether or not to give approval to collective settlements.

As the impact of different funding regimes for collective redress actions remains to be subjected to detailed empirical study, Member States and the EU should conduct a careful analysis of existing funding options in the light of practical experience. The use of innovative new techniques such as crowdfunding should also be further explored.

d) Cost rules

As contingency fees provide one possible mechanism for the funding of collective redress claims, it would be wrong to limit or exclude their use before careful study of their impact in European legal systems has been undertaken. Therefore, the Commission should review and commission empirical research aiming at assessing the impact of contingency fees on the resolution of claims, and in particular the bringing of frivolous claims, in Member States in which such fee arrangements are currently allowed.

e) Collective ADR

Though the provisions of the Recommendation dealing with collective ADR and collective settlements strictly speaking apply only to collective damages claims, Member States should extend their application to injunctive collective redress as well.

When deciding whether or not to give approval to a collective settlement, the court should consider not only its legality, but also the fairness and adequacy of its terms, including the remuneration agreed to be paid to professional advisers, with respect to all group members.

f) Cross-border collective redress

As the Recommendation is a non-binding instrument it could not provide the regulation which is necessary for the efficient handling of cross-border mass cases. Currently, neither the new Brussels I Regulation (coming into force in January 2015) nor the Rome I and II Regulations deals with the particular problems of collective redress proceedings. Although there is a need for clear rules on international jurisdiction for mass disputes, courts will have to make do with the Brussels I Regulation for the time being.

The ELI considers that the Recommendation should encourage Member States to accord legal standing to foreign representative entities which have been founded on an ad hoc basis for a particular mass harm situation in another Member State. Member States should be aware of that possibility when implementing new rules on legal standing.

## COMMENTS ON THE RECOMMENDATION

### Chapter I Purpose and subject matter

1. The purpose of this Recommendation is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation.

2. All Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief, which respect the basic principles set out in this Recommendation. These principles should be common across the Union, while respecting the different legal traditions of the Member States. Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive.

#### *Comments:*

The ELI endorses the purposes detailed in point 1 and the aspiration expressed in point 2 for a set of common principles on collective redress that respect the different legal traditions of the Member States and procedures that are fair, equitable, timely and not prohibitively expensive.

## Chapter II Definitions and scope

3. For the purposes of this Recommendation:

(a) ‘collective redress’ means: (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress);

(b) ‘mass harm situation’ means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons;

(c) ‘action for damages’ means an action by which a claim for damages is brought before a national court;

(d) ‘representative action’ means an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings;

(e) ‘collective follow-on action’ means a collective redress action that is brought after a public authority has adopted a final decision finding that there has been a violation of Union law.

This Recommendation identifies common principles which should apply in all instances of collective redress, and also those specific either to injunctive or to compensatory collective redress.

### *Comments:*

The ELI is broadly satisfied with the definitions of key terms provided in point 3. However, two specific observations are warranted.

First, the inclusion within the scope of the Recommendation of “injunctive collective redress” (point 3(1)(i)) raises issues relating to the overlap of the Recommendation with the current Injunctions Directive (Directive 2009/22/EC of 23 April 2009). In general terms, the definition of injunction established in Article 2(1)(a) of the Injunctions Directive – although its scope is limited to consumer matters – is compatible with the injunctive collective redress covered by the Recommendation. However, the wording of point 3(a)(i) expressly contemplates that two or more natural persons may claim the cessation of illegal behaviour, whereas the Injunctions Directive only grants legal standing to representative entities. It must also be noted that legal standing under the Injunctions Directive relates exclusively to cross-border situations (Article 4.1) and does not apply in purely domestic litigation.

Secondly, it should be clarified that a “mass harm situation” (defined in point 3(b) as “a situation where two or more natural or legal persons claim to have suffered harm causing

damage *resulting from the same illegal activity ...*"; emphasis added) should not be limited to situations where the harm results from an *illegal* activity as this formulation might be interpreted as not covering cases of strict liability arising in respect of the lawful pursuit of a dangerous activity or the lawful storage or use of a dangerous thing. The ELI therefore encourages Member States to construe the Recommendation broadly, even if that stretches the language used, and proposes to the Commission that it revises its language following its assessment of the first four years of implementation in 2017.

## **Chapter III Principles common to injunctive and compensatory collective redress**

### *Standing to bring a representative action*

4. The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements:

(a) the entity should have a non-profit making character;

(b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and

(c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

5. The Member States should ensure that the designated entity will lose its status if one or more of the conditions are no longer met.

6. The Member States should ensure that representative actions can only be brought by entities which have been officially designated in advance as recommended in point 4 or by entities which have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action.

7. In addition, or as an alternative, the Member States should empower public authorities to bring representative actions.

#### *Comments:*

The ELI approves the policy choice reflected in Chapter III of the Recommendation of granting standing to associations to initiate collective or representative actions as opposed to a single representative claimant who suffered loss and acts on behalf of others similarly situated. Granting standing to representative entities is consistent with the institutional legal culture and tradition in many (European) civil law jurisdictions and can also be effected without difficulty in common law and mixed legal systems.

The ELI also approves the choice to allow representative entities to be either designated in advance or certified on an ad hoc basis (point 6). The availability of ad hoc certification is vital because, even in areas such as consumer protection where representative bodies have

traditionally played a leading role, it may be that such bodies are unable or unwilling to act in a specific situation<sup>19</sup>.

A number of specific aspects of the standing provisions call for further comment.

#### *Requirements for ad hoc certification of representative entities*

According to the Recommendation, only entities that have been designated in advance or entities that have been certified on an ad hoc basis by Member States' national authorities or courts for a particular representative action should be allowed to initiate representative collective actions (point 6). The Recommendation expressly provides that in advance designated entities should have a non-profit making character and should be able to demonstrate that there is a link between their activities and the infringement in question and have sufficient capacity in terms of financial resources, human resources and legal expertise, to represent multiple claimants (point 4). It seems that those requirements do not apply to ad hoc certified entities (insofar as point 6 refers "entities which have been officially designated in advance as recommended in point 4"). On that interpretation ad hoc certified entities do not need to have a non-profit making character, to demonstrate a direct relationship between their main objectives and the rights claimed to have been violated, or to show that they have sufficient capacity in terms of financial and human resources, and legal expertise, to represent multiple parties acting in their best interest. It can nevertheless be expected that ad hoc certified entities will need to satisfy certain criteria in order to gain certification. Those requirements may vary within Member States<sup>20</sup>, but it may be reasonably expected that they will reflect at least some of the requirements set out in the Recommendation at point 4<sup>21</sup>.

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<sup>19</sup> This occurred, for example, in the aftermath of the Dutch Dexia consumer securities lease case, in which the role played by the Dutch Consumer Association was called into question, leading it to become especially cautious in taking the lead in subsequent collective actions: I.N. Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands", *Journal of Law, Economics & Policy*, vol. 8, 2012, p. 549, at pp. 577. The Dutch Vie d'Or consumer collective action offers another concrete example of a lack of appetite to act in a specific situation: I.N. Tzankova, "Collective redress in Vie d'Or: a reflection on a European cultural phenomenon", in D.R. Hensler, Ch. Hodges and I.N. Tzankova (eds.), *Class Actions in Context*, Edward Elgar Publishing, 2014; I.N. Tzankova, "Resolving Mass Claim Disputes in Europe: Lessons from the Netherlands", *IADC Newsletter*, February 2013.

<sup>20</sup> For example, in the Netherlands, in addition to the statutory requirements there are further "soft requirements" set out in a Claim Code adopted as a self-regulatory initiative in 2011 (<http://www.consumentenbond.nl/morello-bestanden/pdf-algemeen-2013/compljunicclaimcodecomm2011.pdf>). The Code's adoption reflected the belief in some quarters that the statutory requirements have failed to ensure that ad hoc entities meet standards of proper governance. The Code aims to improve their governance by requiring such entities to have a certain board composition and a financial accounting system in place. The relevance of the Code has been acknowledged by the Dutch legislature, which has specified the Code as a factor that the court might take into account when ruling about the certification of an ad hoc certified entity. For example, the fact that an ad hoc entity does not follow the Claim Code for no good reason could be an indication that the ad hoc entity will not be able to sufficiently represent the interests of the group.

<sup>21</sup> For example, under the Dutch Collective Settlements Act the court has to assess whether the association or the foundation has a non-profit making character, whether its articles of association allow such an action and whether the interests of the group members are granted sufficient protection. See further C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems*, Hart Publishing, 2008, at pp. 70-76; T. Arons and W.H. van Boom,

The ELI considers that the Recommendation should be implemented by the Member States by employing for the purposes of ad hoc certification similar requirements to those which are applicable under point 4 of the Recommendation to the designation of representative entities in advance. This would contribute to a more integrated European collective redress system. To achieve this desirable outcome, it is suggested that the Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (COM(2003) 624 final), (although the proposal was finally withdrawn by the European Commission in May 2014), could serve as a model. Article 8 of that Proposal states the criteria for recognition of qualified entities for the purposes of the Directive. In order to be recognised as a qualified entity, an international, national, regional or local association, organisation or group must comply with the following criteria:

*“(a) it must be an independent and non-profit-making legal person, which has the objective to protect the environment;*

*(b) it must have an organisational structure which enables it to ensure the adequate pursuit of its statutory objectives;*

*(c)<sup>22</sup> ...*

*(d) it must have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State, in accordance with provisions set out by virtue of paragraph 1 (c)”.*

#### *Standing in respect of injunctive collective redress*

The question of standing in respect of injunctive collective redress is another aspect of Chapter III that merits specific consideration, especially regarding the relationship between the Recommendation and the Injunctions Directive (cf. Comments to Chapter II above). It may be noted in particular that the pre-conditions applying to legal standing under the Injunctions Directive are lower than those established by the Recommendation<sup>23</sup>. The Injunctions Directive (Article 3) only requires that the entity should have a legitimate interest

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“Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands”, *European Business Law Review*, vol. 21, 2010, p. 85; X.E. Kramer, “Enforcing Mass Settlements in the European Judicial Area: EU Policy and the Strange Case of Dutch Collective Settlements”, in C. Hodges and A. Stadler (eds.), *Resolving Mass Disputes*, Edward Elgar Publishers, 2013, p. 63.

<sup>22</sup> This part of Article 8 should not apply to ad hoc certified representative entities as it requires a minimum period of prior existence on the part of the organisation.

<sup>23</sup> The lower pre-conditions applying to representative actions for injunctive relief are justified inasmuch as such actions traditionally have limited effects on individuals. Although everybody benefits from a successfully enforced injunction against illegal behaviour, there are generally no negative effects for them (in terms of principles of *res judicata*, etc) if a representative entity’s application for an injunction is dismissed. Individuals, particularly consumers, will often have the chance of suing the defendant individually in subsequent proceedings despite the dismissal. Representative actions for the recovery of damages, on the other hand, are binding on group members and therefore competent representation is more important.



in ensuring compliance with EU rules on consumer matters. The Recommendation<sup>24</sup> incorporates a parallel requirement (a “direct relationship” between the entity’s main objectives and the rights granted under European Union law in respect of whose violation the action is brought: point 4(b)), but adds two further requirements: (a) the entity should have a non-profit making character; and (c) the entity should have sufficient capacity in terms of financial and human resources, as well as legal expertise, “to represent multiple claimants acting in their best interest”. As it may be assumed that representative entities will seek designation under both the Injunctions Directive and the Recommendation, it seems that the latter’s more onerous requirements will in practice supersede the requirement specified in the Injunctions Directive, both in domestic and cross-border cases. Member States should be aware of this and, where appropriate, review the designation rules adopted for the purposes of implementing the Injunctions Directive so as to ensure compliance with the Recommendation’s stricter standards.

### *Agency problems*

One of the issues connected in US literature to the representation of a class by a single representative claimant assisted by counsel operating on a contingency fee basis relates to agency problems or the question how to secure that the agents (the representative claimant and the class counsel) act in the best interest of the class<sup>25</sup>. Many law and economics studies examine such agency problems and offer suggestions to cope with them. However, not much is known about the issues surrounding the representation of a group or class of claimants by non-profit ad hoc or in advance designated entities. There are nevertheless a few empirical case studies that examine how such entities or associations “behave” in the setting of a group or collective action<sup>26</sup>. These studies highlight the main problems that will have to be addressed by Member States in implementing the Recommendation, and suggest ways in which those problems may be avoided in practice<sup>27</sup>.

First, there is a risk that established associations who become designated entities in accordance with the Recommendation might not be willing or able to act in a specific situation<sup>28</sup>. Consequently, the availability of an alternative option that allows a collective or group action to be initiated by ad hoc court certified claimants is key for an effective remedy

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<sup>24</sup> At least as regards representative entities designated in advance, rather than those founded and certified on an ad hoc basis. See Comments above.

<sup>25</sup> For example, D. Hensler, “Financing Civil Litigation: the US perspective”, in M. Tuil and L. Visscher (eds.), *New Trends in Financing Civil Litigation in Europe*, Edward Elgar Publishers, 2010, p. 149 et seq.; S. Issacharoff and G.P. Miller, “Will Aggregate Litigation Come to Europe?”, *Vanderbilt L.J.*, vol. 62, 2009, p. 179, at 188.

<sup>26</sup> See W.H. van Boom and G. Wagner (eds.), *Mass Torts in Europe: Cases and Reflections*, de Gruyter, 2014 forthcoming; D.R. Hensler, Ch. Hodges and I.N. Tzankova (eds.), *Class Actions in Context*, Edward Elgar Publishers, 2014, forthcoming.

<sup>27</sup> This section draws substantially upon I.N. Tzankova, “Multiple Claims and Parties”, paper delivered at the UNIDROIT/ELI Conference “From Transnational Principles to European Rules on Civil Procedure”, held on 18-19 October 2013, Vienna. See also G. Wagner, “Mass Tort Resolution: Competition between Jurisdictions and Mechanisms”, in van Boom and Wagner, fn. 29, p. 263, at pp. 266-269.

<sup>28</sup> See fn. 19.

even in consumer matters, where established consumer bodies have traditionally played a leading role in consumer protection.

Secondly, problems may arise if public agencies financed by the State are given the exclusive right to initiate collective actions or the power to take over or veto private collective actions initiated by others<sup>29</sup>. There is a risk that, in these circumstances, the public representative entity will develop its own organisational agenda that in the long run discourages the effective enforcement of consumer rights<sup>30</sup>.

A final lesson to be derived from the experience of collective claims both in and outside Europe is that neither established non-profit associations nor ad hoc court certified foundations should be dependant for their funding from State resources, whether in respect of collective actions or otherwise<sup>31</sup>. This is not only because governments are always under budgetary pressure and so seldom provide sufficient funds, but also because regulatory and semi-regulatory agencies might appear as defendants in collective claims, meaning that the State may face a conflict of interest in determining the funds that are available to the representative entity for the pending claim or for future claims.

These considerations underline the need for Member States to adopt clear rules and criteria on legal standing in cases where several different entities claim to represent mass tort victims or consumers. It is envisaged that national courts will play a key role in that process, as part of their general function of managing collective redress actions effectively (recital 21). One aspect of that task will be the development of adequate selection criteria. To enable the courts to perform these roles optimally, the ELI recommends that Member States and the EU set up training programs for judges who will be dealing with collective redress actions, bearing in mind that the case management of mass disputes differs from the case management of ordinary claims<sup>32</sup>. Ideally the EU should facilitate uniform judicial case management training programs at EU level to handle collective redress actions<sup>33</sup> via the European Judicial Network.

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<sup>29</sup> See the La Polar case in Chile: A. Barroilhet, "Gatekeeper or hijacker? Public versus private enforcer in Chilean class actions", in D.R. Hensler, Ch. Hodges and I.N. Tzankova (eds.), fn. 29.

<sup>30</sup> Such conduct on the part of public agencies seems to be common under mixed enforcement regimes. The public takes the best from the private ("free rides") and leaves the more risky or complicated actions to be pursued by private means: D.F. Engstrom, "Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation under the False Claims Act", *Northwestern University Law Review*, vol. 107, 2013, p. 1689.

<sup>31</sup> Examples are provided by *Parking-Lots-Attendant Union v. Taipei Government* (Taiwan) and the Dutch *Vie d'Or* case. See respectively K.C. Huang, "Using associations as vehicles for class actions: the case of Taiwan", in D.R. Hensler, Ch. Hodges and I.N. Tzankova (eds.), fn. 29, and I.N. Tzankova, fn. 36 (2012).

<sup>32</sup> I.N. Tzankova, "Managing the Mass: From Case Managing Mass Disputes to Designing Claim Resolution Facilities", working paper presented at the EIF conference "The Transformation of Enforcement" held on 27-28 June 2013 in Florence and the UNIDROIT/ELI Conference in October 2013 in Vienna, Austria.

<sup>33</sup> Ibid.

In conclusion, although the agency problems with respect to non-profit entities that bring collective actions are underappreciated<sup>34</sup> and still need to be studied in a more systematic way, it can be asserted that diversity, as opposed to monopoly, is generally speaking a good thing and should be adequately secured in the context of entities or persons that are allowed to initiate collective redress actions.

#### *Implementation in Member States*

Member States should take care to provide clear rules and criteria on legal standing in cases where several different entities claim to represent mass tort victims or consumers. It is envisaged that the courts will play a key role in this context by developing adequate selection criteria. For that purpose, and for the purposes of managing collective redress in general, Member States and the EU should set up training programs for judges who will be dealing with collective redress actions.

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<sup>34</sup> R. van den Bergh, "Private Enforcement of European Competition Law and Persisting Collective Action", *Maastricht Journal of European and Comparative Law*, vol. 20, 2013, p. 12, at pp. 22-30.

### Admissibility

8. The Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.

9. To this end, the courts should carry out the necessary examination of their own motion.

#### *Comments:*

The verification of claims at the earliest possible stage of proceedings is apparently meant to be a further safeguard against unmeritorious suits. However, it is not entirely clear from the text of point 8 exactly what “verification” means. The basic idea seems to be borrowed from the US instruments of “motion to dismiss” and summary judgment (Rule 56 Federal Rules of Civil Procedure), but it does not fit very well into procedural systems in Europe.

The primary reason why summary judgments are available in the US is as a *quid pro quo* for the American rule on costs whereby each side covers its own expenses, win or lose. Defendants in the US must therefore have the chance of obtaining a dismissal of a frivolous action before entering into the extremely expensive pre-trial discovery stage of litigation as there will be no reimbursement of litigation costs at the end. In Europe, where in most Member States the “loser pays” principle applies (and is to be preserved in respect of collective redress: see point 13 of the Recommendation) it is rather doubtful whether such an additional safeguard against unmeritorious cases is necessary.

As a matter of course, the formal certification of the class or group will be necessary at an early stage of proceedings in the Member States. Certification, however, traditionally includes only consideration of the formal requirements of the group or class action<sup>35</sup>. By contrast, the Commission’s Recommendation apparently refers both to the formal (in)admissibility of the action (“cases in which conditions for collective action are not met”) and to “manifestly unfounded cases” which seem to require summary judgment at an early stage of the proceedings. The latter is hardly compatible with the traditional structure of civil procedure in Europe – at least, on the continent<sup>36</sup>. Under existing procedural rules in many Member States it suffices that the claimant’s action satisfies the requirement of conclusiveness. Any decision on the merits of the case is given after the taking of evidence

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<sup>35</sup> In fact, that there has been an intensive debate in the US for some years whether courts should take into account subject matter issues when making a decision on the certification of the class: R. Marcus, “America’s dynamic and extensive experience with collective litigation”, in C. Hodges and A. Stadler (eds.), *Resolving Mass Disputes*, Edward Elgar Publishers, 2013, p. 148, at pp. 159-163; R. Bone and D. Evans, “Class Certification and the Substantive Merits”, *Duke L. J.*, vol. 51, 2002, p. 1251. This again has its background in the US system of high litigation costs with no reimbursement of expenses to the winning party. Once a class has been certified there is often irresistible pressure on the defendant to settle even if the defendant would likely win at trial. As to the controversy relating to this “blackmailing effect” in the US, see C. Silver, “‘We’re Scared to Death’: Class Certification and Blackmail”, *NYU L Rev.*, vol. 78, 2003, p. 1357.

<sup>36</sup> In England and Wales Part 24 Civil Procedure Rules governs the award of summary judgments.

and based on a thorough assessment of the legal implications. A summary judgment, by contrast, allows the court to dismiss an action if the applicant shows that there is no genuine dispute as to any material fact and the applicant is entitled to judgment as a matter of law<sup>37</sup>. Courts should grant such decisions only if the outcome of the proceedings is obvious.

The Commission seems to have in mind a summary examination of the merits of the claim, but it is not clear what criteria are to be applied in the court's decision or what the legal consequences should be. Specifically, it should be considered whether or not summary judgment means that the matter becomes *res judicata* and whether or not a subsequent claim based on better arguments or additional evidence should be allowed. A preliminary examination by the court that involves legal submissions or the taking of evidence unnecessarily protracts the proceedings and will make it difficult to draw a line between the preliminary hearing and the "real" one.

The dismissal of the claimant's action on the exclusive basis of a summary review at the beginning of the litigation may also violate the claimant's right to access to justice (if this is interpreted to require a full review of the claimant's case once the formal requirements for the complaint are met). For very good reasons, court decisions without a full trial are normally restricted in the Member States to exceptional situations, such as requests for provisional or interim relief. Such decisions have limited *res judicata* effects and are normally followed by a full trial on the application of one or other of the parties.

Consequently, the ELI believes that the additional safeguard provided by the verification procedure stipulated in point 8 is unnecessary and undesirable.

#### *Implementation in Member States:*

National rules should clearly distinguish between the formal certification of actions as a necessary precondition for the invocation of collective redress procedures and summary judgment on the merits of the case in the early stages of the litigation. If Member States allow the early dismissal of actions on the merits they should do so only on the basis of clearly defined and strictly limited criteria and should not generally accord such decisions *res judicata* effect. National legislatures must also be aware that a positive preliminary court decision on the merits might influence the decision to opt in to the collective proceedings (see point 21) and may thus be unfair to defendants<sup>38</sup>. Therefore, the court's decision should be made after the deadline for opting-in.

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<sup>37</sup> See for example Rule 56 Federal Rules of Civil Procedure.

<sup>38</sup> R. Marcus, "America's dynamic and extensive experience with collective litigation", fn. 48, at p. 159.

### *Information on a collective redress action*

10. The Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under Union law and their intention to seek an injunction to stop it as well as about a mass harm situation and their intention to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, ad hoc certified entity, a public authority or for the group of claimants should be ensured as regards the information on the ongoing compensatory actions.

11. The dissemination methods should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information, and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court.

12. The dissemination methods are without prejudice to the Union rules on insider dealing and market manipulation.

#### *Comments:*

The ELI shares the regret expressed by the European Economic and Social Committee (EESC) that the Recommendation does not provide for an electronic register of actions at European level which is available to be consulted by those suffering harm throughout the EU. As the EESC notes, a register of that nature would be cheap and efficient to run and would help the public and businesses to exercise their rights<sup>39</sup>.

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<sup>39</sup> European Economic and Social Committee (EESC), Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a European Horizontal Framework for Collective Redress, 10 December 2013, COM(2013) 401 final.

### *Reimbursement of legal costs of the winning party*

13. The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ('loser pays principle'), subject to the conditions provided for in the relevant national law.

#### *Comments:*

The ELI notes that the practical application of the "loser pays" principle can be very different from one Member State to another in terms of the percentage of the winner's costs that are recoverable in practice. As levels of remuneration for legal services can vary significantly between Member States<sup>40</sup>, it may be very difficult for lawyers in one country to advise claimants on their potential liability in costs in proceedings brought in another country. This might act as a disincentive to the use of collective redress, frustrating the aims of the Recommendation. Therefore it is suggested that national law should recognise a judicial discretion as to the amount of costs recoverable by the winning party, having regard to the financial situation of the loser and the reasons why the claim succeeded or failed. At the least, this should apply in the case of claims brought by non-profit representative bodies, for which the "loser pays rule" may have a "crippling" effect<sup>41</sup>.

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<sup>40</sup> This may be expected to continue notwithstanding the limited control over lawyers' fees envisaged in points 29 and 30 of the Recommendation.

<sup>41</sup> EESC Opinion, fn. 54, point 4.9.2 (proposing the capping of legal costs for such bodies).

### *Funding*

14. The claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action.

15. The court should be allowed to stay the proceedings if in the case of use of financial resources provided by a third party:

- (a) there is a conflict of interest between the third party and the claimant party and its members;
- (b) the third party has insufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure;
- (c) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.

16. The Member States should ensure, that in cases where an action for collective redress is funded by a private third party, it is prohibited for the private third party:

- (a) to seek to influence procedural decisions of the claimant party, including on settlements;
- (b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant;
- (c) to charge excessive interest on the funds provided.

#### *Comments:*

The provisions of the Recommendation dealing with funding prompt a number of specific reflections, as well as a number of wider observations (which follow, below).

As regards the specific matters addressed in points 14 to 16:

(1) The requirement in point 14 that the claimant party should declare to the Court at the outset of the proceedings the origin of the funds to be used to support the legal action should not be interpreted as requiring the claimant party to disclose details of the funding arrangements in place as that could give the defendant party tactical and strategic advantages in the litigation. A simple declaration by the claimant party about the (private or third party) origin of the funds should suffice.

(2) Point 15 provides that national courts should be able, under certain conditions, to stay the proceedings in the case of use of financial resources provided by a third party, but the Recommendation contains no definition of “third party” and the meaning of this term is likely to give rise to satellite litigation. Arguably, all funds available to representative entities are “financial resources provided by a third party”. Further, claims financed out of public funds (legal aid), individual member contributions and legal expenses insurance may also fall within the scope of point 15. The Commission should attempt to resolve these potential ambiguities in its review of the Recommendation’s implementation in 2017.



(3) The Recommendation does not make a distinction between consumer representative actions and representative actions on behalf of businesses. In the first case, regulating funding of every kind makes sense from the point of view of consumer protection, which is a core aim of EU action in the field of collective redress. It is unclear, however, what justification can be advanced for State regulation of litigation funding arrangements between businesses. At the very least, evidence of need for such restrictive measures should be presented.

(4) Point 16 (a) recommends that the Member States should ensure that third party funders do not seek to influence procedural decisions of the claimant party, including decisions on settlements. It is, however, unrealistic to expect third party funders to shoulder the procedural risk of the litigation and to leave it completely to the claimant to conduct and ultimately to settle the case. Third party funders have - at least to some extent - a legitimate interest in being involved in important decisions that have to be made by the claimant party. It is, however, necessary to prevent abuse and to make sure that the third party funder's interests do not prevail over the legitimate interests of the claimant group members. Consequently, when scrutinising the proposed settlement courts should examine the influence exerted by third party funders and evaluate its propriety.

#### *The Wider Funding Context*

The ELI believes that the issue of funding is crucial to the effectiveness of collective redress and regrets that the Commission did not consider funding questions of a general nature, as opposed to the specific issue of restrictions on third-party funding. The ELI therefore calls upon the Commission to address the general issue of funding of collective redress in its four-year review of the Recommendation's implementation, paying especial regard to the specific points mentioned below.

Generally speaking, at least six different funding mechanisms can be identified for funding a representative action: i) individual member contributions or donations, ii) legal aid, iii) legal expenses insurance taken out before the event triggering the insurance entitlement occurs, iv) special multi-party and representative action funds, v) third party funding after the event, provided by commercial entities (private equity) working on the basis of a percentage of damages obtained and vi) lawyers' contingency fees<sup>42</sup>. Each funding source raises different issues. For example, "free-rider problems"<sup>43</sup> and other logistical challenges related to the acquisition of funds mean that individual group member contributions will often turn out to

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<sup>42</sup> See R.P. Mulheron, "Cost Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere", in D. Dwyer (ed.), *The Tenth Anniversary of the Civil Procedure Rules*, Oxford, Oxford University Press, 2010, p. 183-228, at pp. 191-196; R.P. Mulheron, "Costs and Funding of Collective Actions: Realities and Possibilities", Feb 2011, available online at <http://www.law.qmul.ac.uk/docs/staff/departement/71112.pdf>; I.N. Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands", fn. 19, at pp. 571-591.

<sup>43</sup> The free rider problem arises where a group member is able to profit from a representative action without financially contributing to it.

be an inadequate source of funding<sup>44</sup>. Likewise, legal aid is unlikely to prove adequate in most jurisdictions because of its generally restrictive eligibility criteria. Even if Member States were to ensure that representative entities are eligible for legal aid, which is currently often not the case, this cannot be viewed as a complete solution. Quite apart from its own budget constraints, legal aid does not offer any assistance in cross-border claims or when claimants are SMEs.

Before-the-event legal expenses insurance *does offer* a potentially useful mechanism for funding collective redress. However, as a result of the ruling of the Court of Justice of the European Union (CJEU) in the Austrian *UNIQA* case<sup>45</sup>, legal expenses insurers might choose to exclude mass disputes and group or representative actions from their coverage, as happened in Germany in the aftermath of the *Deutsche Telecom* case<sup>46</sup>. Where insurers have not excluded coverage of mass disputes from their policies, their business models may still prevent them from funding a representative action unless the number of insurers who report a loss is significant. That will rarely be the case for a single insurer. In addition, the business model of before-the-event legal expenses insurers generally favours the quick settlement and resolution of claims<sup>47</sup>, which may not always be in the best interests of the claimant group. Before-the-event legal expenses insurance thus cannot be viewed as a complete solution to the problem of funding collective redress.

Other funding options also merit consideration, for example the creation of special funds to finance claims in mass consumer disputes<sup>48</sup> or representative actions more generally<sup>49</sup>. Mechanisms involving the distribution of damages for substitute purposes (“*cy-près* distribution”<sup>50</sup>) also deserve further analysis, even though they are not currently widely available, and would need an explicit statutory basis in most Member States. “Crowdfunding” based on the solicitation of multiple voluntary contributions of small amounts provides another relatively novel but promising mechanism for the funding of collective redress; its participatory aspects may be considered an especial advantage. However, European Union law should ensure that it is possible for representative entities to resort to crowdfunding

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<sup>44</sup> I.N. Tzankova, “Funding of Mass Disputes: Lessons from the Netherlands”, fn. 19, at pp. 571-591.

<sup>45</sup> Case C-199/08, *Eschig v. UNIQA*, 2009, ECR I-8295.

<sup>46</sup> See A. Halfmeier, “Litigation without end? The German approach to private enforcement of securities law”, in D.R. Hensler, Ch. Hodges and I.N. Tzankova (eds.), *Class Actions in Context*, fn. 29.

<sup>47</sup> W.H. van Boom, “Financing Civil Litigation by the European Insurance Industry”, in M. Tuil and L. Visscher (eds.), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical, and Economic Analysis*, p. 94-99 where the author provides a general analysis of the business model of before-the-event legal expenses insurers and related agency problems. For a discussion of the differences between the Dutch and German markets for legal expense insurances see I.N. Tzankova, “Funding of Mass Disputes: Lessons from the Netherlands”, fn. 19, at pp. 578-579.

<sup>48</sup> A.-L. Sibony, “Les actions collectives en droit européen: cent fois remettre sur le métier”, *European Journal of Consumer Law*, vol. 3-4, 2010, p. 577-602, at p. 598.

<sup>49</sup> See R.P. Mulheron, “Cost Shifting, Security for Costs, and Class Actions”, fn. 55, p. 192-193.

<sup>50</sup> See R.P. Mulheron, “Cy-Près Damages Distributions in England: A New Era for Consumer Redress”, *European Business L Rev*, vol. 20, 2009, p. 307-342 where she discusses cy-près in the UK context. At p. 324-342, she discusses a framework and defines a check list about how and when to apply cy-près. See also R.P. Mulheron, *The Modern Cy-Près Doctrine: Applications and Implications*, London, Routledge Cavendish, 2006, chapters 7 and 8.

methods and, in particular, should remove the current obstacles to cross-border crowdfunding<sup>51</sup>.

A further option that appealed to members of the ELI Project Team was the creation of a special fund, preferably at EU level, which would receive donations from successful litigants<sup>52</sup>. The idea would be to “nudge” consumers (or other successful claimants) to donate part of the money they have been awarded in the trial or settlement. After receiving the money, successful consumers would be presented with the choice between taking their share of the damages (often a very small sum) or donating some or all of the money they obtained to a fund which would finance future collective actions.

Consideration could also be given to the creation of a European (or national) fund out of monies obtained from the enforcement of injunctive orders in collective redress proceedings (see below, Comments to points 19 and 20), the enforcement of civil fines in cartel cases or the disgorgement of unlawful profits<sup>53</sup>.

However, it should be noted that the Recommendation (at points 15, 16 and 32) restricts the use of contingency fees and third party funding to such an extent that they cannot be considered a realistic option in most representative actions. Therefore the conclusion could very well be that, at this point, there are no completely viable funding options in the EU in place for the funding of representative actions.

As this wider funding context is not addressed in the current Recommendation, but is vital to the effective implementation of collective redress in Europe, the ELI proposes that the Commission should address funding issues explicitly in its four-year review of the Recommendation’s implementation, and in the meantime should review and commission research into the funding mechanisms currently available in collective redress proceedings in Member States and elsewhere. The ELI notes that, in preparation for the current Recommendation, the Commission conducted several studies within the Member States aimed at assessing and demonstrating the need for collective redress and representative actions. It would be consistent with that approach to assess and explore the funding of mass disputes in the various Member States before coming up with any recommendation on the funding issue, having regard in particular to the funding arrangements that are currently available in the Member States to finance multi-party and representative actions, how these operate in practice and what kind of issues the various funding sources raise.

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<sup>51</sup> Cf. Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Unleashing the potential of Crowdfunding in the European Union. Brussels, 27.3.2014, COM(2014) 172 final.

<sup>52</sup> See A.-L. Sibony, “Les actions collectives en droit européen...”, fn. 49.

<sup>53</sup> For such a proposal made with respect to German law see H.W. Micklitz and A. Stadler, *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft*, Münster, German Federal Ministry for Consumer Protection, Nutrition and Agriculture, 2005, p. 1270 et seq., available at: <http://www.jura.uni-konstanz.de/stadler/forschung/publikationen/hinweis-verbandsklagerecht/>; K.-H. Fezer, *Zweckgebundene Verwendung von Unrechtserlösen und Kartellbußen zur Finanzierung von Verbraucherarbeit*, 2012 <http://www.umwelt.nrw.de/verbraucherschutz/wirtschaft/wettbewerbsrecht/index.php>.

*Implementation in Member States:*

As a safeguard for claimants national rules should provide that, if the claimant party is required to declare the origin of the funds, it should do so to the court only. The information provided should not be made available to the defendant.

Member States should ensure that private third party funders do not misuse their position and do not improperly influence procedural decisions made by the claimant party, especially if the claimants are consumers. With respect to court approval of settlements, judges should be requested to take into account the possible influence of private third party funders on the settlement.

Lastly, to ensure that funding sources do not have different effects in the various Member States<sup>54</sup>, Member States and the EU should conduct a careful analysis of existing funding options in the context of mass disputes and representative actions. Only after such an analysis can it be decided what the most appropriate action with respect to funding should be at EU level and how the use of third party funding and contingency fees should be regulated.

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<sup>54</sup> For a discussion of the differences between the Dutch and German market of legal expense insurances see I.N. Tzankova, "Funding of Mass Disputes: Lessons from the Netherlands", fn. 19, pp. 572-573, 583.

### *Cross-border cases*

17. The Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.

18. Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation.

#### *Comments:*

Cross-border cases should always be kept in mind when dealing with matters of European law<sup>55</sup>. As the Recommendation is a non-binding instrument it could not provide the regulation which is necessary for the efficient handling of cross-border mass claims. Currently, neither the new Brussels I Regulation (coming into force in January 2015) nor the Rome I and II Regulations deal with the particular problems of proceedings for collective redress. Although there is a need for clear rules on international jurisdiction in respect of mass disputes, courts will have to make do with the Brussels I Regulation for the time being. It is likely that competition among Member States for “big” cases will increase, which may lead to intensive forum shopping and parallel litigation which cannot be handled by existing legal provisions; these consequently need improvement<sup>56</sup>. The rather individualistic approach taken by the Rome II Regulation which protects the individual expectations of tort victims in product liability and competition cases will often have as its consequence that courts in cross-border mass disputes cannot apply a single set of tort rules to the numerous claims that are brought. These issues are very likely to create obstacles for the efficient enforcement of mass claims in practice. The ELI therefore recommends that the European legislature initiates a broad discussion on private international law issues relating to collective redress in order to come up with a solution when the Commission revisits the situation in its four-year review of the Recommendation’s implementation<sup>57</sup>.

The provisions of the Recommendation dealing with cross-border cases (points 17 and 18) only address the issue of the legal standing of representative entities. They should be considered to seek a similar goal to the rule established in Article 4(1) of the Injunctions Directive, which is to allow entities complying with the relevant requirements in one Member State to also be granted legal capacity and legal standing to apply to courts or administrative

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<sup>55</sup> A. Nuyts, N. E. Hatzimihail (eds.), *Cross-Border Class Actions*. The European Way, Sellier European Law Publishers, 2014.

<sup>56</sup> See below p. 52.

<sup>57</sup> A. Stadler, fn. 21; for more detailed discussion see A. Stadler, “Conflicts of Laws in Multinational Collective Actions – a Judicial Nightmare?”, in D. Fairgrieve and E. Lein (eds.), *Extraterritoriality and Collective Redress*, Oxford, Oxford University Press, 2012, p. 191; D. Fairgrieve, “The Impact of the Brussels I Enforcement and Recognition Rules on Collective Actions”, *ibid*, p. 171.

authorities in another Member State—viz. the State in which the infringement of European Union law occurred—if this infringement of European Union law affects the interests of stakeholders in the Member State in which the entity is established.

However, the Recommendation and the Injunctions Directive apparently establish different principles in seeking to achieve this objective.

Point 18 of the Recommendation has a broader effect than Articles 3 and 4 of the Injunctions Directive if in a cross-border case the infringement has its origin in one Member State (normally the place where the infringer is domiciled) but causes harm or injury to consumers in various other Member States. Point 18 asks all Member States having jurisdiction over the case to accept the legal standing of particular representative entities from other Member States. This includes the Member States where the injury or harm occurred in the sense of Article 5 no. 3 of the Brussels I Regulation (Article 7 no. 2 of the Brussels I Regulation Recast), even though the tortious act may have been committed elsewhere. Under the Injunctions Directive the “country-of-origin” principle applies only to actions filed in the Member States where the “infringement originated” (which is the place where the tortious act was committed). Thus, the Recommendation invites the Member States to accept the legal standing of foreign representative entities in circumstances going beyond what is provided for in the Injunctions Directive. Given that proceedings for injunctive relief may be more effective in one Member State than in another, point 18 thus allows the necessary forum shopping by representative entities.

With respect to the entities qualified to bring cross-border actions, the scope of application of point 18 of the Recommendation seems to be stricter than under the Injunctions Directive. Points 4 and 6 of the Recommendation distinguish between “entities which have been officially designated in advance” and “entities which have been certified on an ad hoc basis by a Member State’s national authorities or courts for a particular representative action”. For cross-border situations, point 18 of the Recommendation exclusively refers to the first type of representative entity, not to the latter. This seems to indicate that entities certified on an ad hoc basis for a particular representative action in one Member State are not supposed to act as a representative entity in other Member States. However, according to Articles 3 and 4 of the Injunctions Directive any “qualified entity” established in one Member State and representing the interests protected has legal standing in the Member States where the infringement originated. The definition of “qualified entity” in Article 3 refers to organisations which “being properly constituted according to the law of a Member State” have a legitimate interest in ensuring that certain provisions protecting consumers are complied with. This raises the question whether the definition given in Article 3 includes representative entities certified according to the Recommendation on an ad hoc basis for a particular representative action (with the peculiarity that they would have been created for the purpose of litigating abroad). It is, however, more likely that point 6 of the Recommendation (read together with point 18) establishes that national authorities or courts can certify representative entities on an ad hoc basis only for the particular proceedings taking place before those authorities or courts. Nevertheless, the

Recommendation leaves it to them to certify even foreign representative entities which have been founded (on an ad hoc basis for a particular mass harm situation) in another Member State. Member States should be aware of that possibility when implementing new rules on legal standing.

From the cross-border perspective, it should also be noted that Articles 27 and 28 of the Brussels I Regulation address the problem of parallel proceedings and irreconcilable judgments by giving preference to the court where proceedings were first initiated. As Article 27 requires not only ‘the same cause of action’ in all proceedings, but also the participation of ‘the same parties’, it will not apply to parallel proceedings initiated by (different) representative entities. Article 28, however, confers broad discretion on the courts to stay proceedings (Article 28(1)) or even to decline jurisdiction with regard to the possibility of consolidating the proceedings in the court first seized (Article 28(2)). Consolidation depends, however, on the procedural law applicable in the Member State where the first action has been filed. In order to avoid irreconcilable judgments Member States should consider the implementation of national rules generously permitting the consolidation of “related actions” within the meaning of Article 28(2) of the Brussels I Regulation.

*Implementation in Member States:*

The ELI considers that the Recommendation should encourage Member States to accord legal standing to foreign representative entities which have been founded on an ad hoc basis for a particular mass harm situation in another Member State. Member States should be aware of that possibility when implementing new rules on legal standing.

Member States should also consider the implementation of national rules which generously allow the consolidation of “related actions” in cross-border mass harm situations thus giving Article 28(2) of the Brussels I Regulations broader application in practice.

## Chapter IV Specific principles relating to injunctive collective redress

### *Expedient procedures for claims for injunctive orders*

19. The courts and the competent public authorities should treat claims for injunctive orders requiring cessation of or prohibiting a violation of rights granted under Union law with all due expediency, where appropriate by way of summary proceedings, in order to prevent any or further harm causing damage because of such violation.

### *Efficient enforcement of injunctive orders*

20. The Member States should establish appropriate sanctions against the losing defendant with a view to ensuring the effective compliance with the injunctive order, including the payments of a fixed amount for each day's delay or any other amount provided for in national legislation.

#### *Comments:*

The ELI agrees that there is a need for expediency in the resolution of claims for injunctive orders and supports the efficient enforcement of such orders. It notes that experience of the use of injunctions in the context of consumer protection may well be relevant in the pursuit of these objectives in the context of collective redress procedures introduced under the Recommendation even outside the consumer field.

It may be noted that these provisions of the Recommendation mirror similar provisions of the Injunctions Directive:

(a) Point 19 requiring expediency in respect of procedures where injunctive relief is sought is in similar terms to Article 2(1)(a) of the Injunctions Directive. It is a simple requirement for Member States to comply with: in general, the techniques used for the national implementation of the Injunctions Directive in consumer matters may simply be extended to new areas of European Union law. A different issue, of course, is the compliance in practice of legal provisions with the expediency requirement.

(b) Point 20 is aimed at ensuring that efficient enforcement measures are established by Member States for injunctive orders. Specific reference is made to a fixed amount for each day's delay or any other amount provided for in national legislation, which are precisely the enforcement measures established by Article 2(1)(c) of the Injunctions Directive. In practice daily penalty payments can be considered an efficient solution; the wording of point 20 leaves space for different national traditions regarding the beneficiary of such sums (e.g. the winning party in the case of the French *astreinte*, or the State in the case of the German *Zwangsgeld*).

(c) There are two features of the Injunctions Directive that do not appear in the Recommendation: (i) provision for the publication of decisions and/or corrective statements with a view to eliminating the continuing effects of infringements (Article 2(1)(b)); (ii) a prior-consultation rule, allowing Member States to introduce or



maintain in force provisions requiring consultation with a view to achieving the cessation of the infringement prior to the commencement of any action for an injunction (Article 5). The absence of those features suggests that the European Commission does not consider them to amount to the category of «core» rules or principles of collective injunctive redress; but obviously Member States need not feel precluded by the Recommendation to use them in European Union law fields other than consumer matters, since none of them are incompatible with the Recommendation's own provisions.

Lastly, it may be noted that there is no express mention in the Recommendation of collective ADR and settlement in respect of claims for injunctive, as opposed to compensatory, collective redress. Collective ADR and settlement is addressed only in points 25 to 28, in the section of the Recommendation entitled "Specific Principles relating to Compensatory Collective Redress". The ELI believes that points 25 to 28 should also be considered to be applicable in cases where there is no mass harm situation but illegal practices concerning rights granted under Union law has occurred. More specifically:

- (a) The use of ADR techniques and the achievement of settlements (point 25) may also be considered desirable in claims for injunctive collective redress.
- (b) The use of collective ADR techniques where injunctive collective redress is appropriate could render unnecessary individual ADR proceedings in such circumstances. In consumer matters the Directive on consumer ADR (Directive 2013/11/EU of 21 May 2013) is not applicable to collective cases (see recital 27 of the ADR Directive)<sup>58</sup>, but individual injunctive relief is not excluded from its scope of application.
- (c) The rule on limitation periods contained in point 27 is also suitable to be applied to the use of ADR procedures in claims for injunctive collective redress.
- (d) The need for judicial control over binding settlements (point 28) exists in the same way for injunctive as for compensatory collective redress, since in both types of procedure there is a risk that the settlement may not appropriately protect the rights and interests of all parties involved.

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<sup>58</sup> «(27) This Directive should be without prejudice to Member States maintaining or introducing ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. Comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level. The existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures». Paradoxically, however, the Consumer ADR Directive has been included in Annex I of the Injunctions Directive (see Article 23 of the Consumer ADR Directive); therefore, injunctions could be sought against Member States not complying with the duties arising under the Consumer ADR Directive to ensure access to ADR schemes in «consumer to business» disputes within the European Union.

### *Implementation in Member States:*

The 2009 Injunctions Directive and the current Recommendation have similar foundations and also seek similar goals: no dramatic change has taken place in this regard. However, there are also some differences: therefore, national rules adopted for the purposes of implementing the Injunctions Directive may fall short of achieving full compliance with the Recommendation.

Member States should therefore review their existing legislation enacted in implementation of the Injunctions Directive, in order to extend it (if necessary) to the new areas mentioned in recital (7) of the Recommendation (i.e. beyond consumer law).

Member States should also adapt their national rules to the new requirements set by the Recommendation regarding legal standing, both for domestic and cross-border situations.

Further, Member States should consider the convenience of extending to injunctive collective redress the specific principles relating to compensatory redress concerning collective ADR and settlements.

Lastly, Member States should analyse their own experience with the “expedient procedures” and “efficient enforcement” provisions of the Injunction Directive, since they are mirrored by corresponding provisions in the Recommendation. Practical lessons derived from that experience may be beneficial in ensuring effective compliance with the Recommendation.

## Chapter V Specific principles relating to compensatory collective redress

### *Constitution of the claimant party by 'opt-in' principle*

21. The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.
22. A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice.
23. Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is given or the case is otherwise validly settled, if this does not undermine the sound administration of justice.
24. The defendant should be informed about the composition of the claimant party and about any changes therein.

#### *Comments:*

In the Recommendation, opt-in is the general principle and opt-out the exception. This calls for several remarks relating to the Commission's forthcoming review of the Recommendation's implementation in 2017 (as provided for by point 41 of the Recommendation).

First of all, the principle/exception relationship between opt-in and opt-out should itself be within the scope of the review planned for 2017. The ELI believes that the arguments in favour of opt-out, at least as a component of the collective redress system, are stronger than the Commission currently recognises.

Secondly, the Commission's review should pay particular attention to the ongoing collective redress reforms which have been introduced or are in the process of being introduced in several Member States, some of which have adopted the opt-out principle (for example, in Portugal, Denmark, the Netherlands and the UK<sup>59</sup>) or a mix of opt-in and opt-out (Belgium)<sup>60</sup>. The ELI believes that the impact of the opt-in principle should be reviewed on the basis of the

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<sup>59</sup> The British Institute of International and Comparative Law website on Collective Redress (funded by the EU) includes overviews of the relevant national systems, with regular updates on reforms: URL: [www.collectiveredress.org](http://www.collectiveredress.org).

<sup>60</sup> E. Falla, *Powers of the judge in collective redress proceedings*, Université Libre de Bruxelles, February 2012; European Parliament, Overview of existing collective redress schemes in EU member states, Directorate General for internal policies, Policy department A: economic and scientific policy, July 2011; BEUC, Country survey of collective redress mechanisms (updated in December 2011); Les actions de groupe. Les documents de travail du Sénat Belge, Mai 2010; Strooischade: Een verkennend (rechtsvergelijkend) onderzoek naar de mogelijkheden tot optreden tegen strooischade, Juli 2009.

evidence available in 2017, and that the Recommendation should not be read as putting a stop to national experiments with opt-out<sup>61</sup>.

Thirdly, in considering the circumstances in which exceptions from the opt-in principle are justified (point 21, 2<sup>nd</sup> sentence), the notion of “the sound administration of justice” should be interpreted broadly. In line with the principle of procedural autonomy, a wide margin of appreciation should be left to Member States when determining what the demands of “the sound administration of justice” are. In particular, Member States should be free to consider that the right to an effective remedy is a component of “the sound administration of justice”. In this context, the experience of various Member States that the compensation of large-scale loss made up of significant but low-value claims is only viable with some form of opt-out mechanism must be deemed relevant when assessing justifications put forward by national legislators and courts.

As the Recommendation has a strong focus on the compensation of consumers and tort victims, it does not mention the instrument of disgorgement or skimming-off of illegally gained profits from wrongdoers, which has primarily deterrent effects. However, Member States that are reluctant to accept the opt-out mechanism for whatever reasons should instead consider the implementation of such instruments (whether in private or public law) for cases that involve only very small individual damage<sup>62</sup>.

Fourthly, with regards to opt-in / opt-out, the insights of behavioural science are very clear: where there is a default option, people tend not to actively choose a different option even when they could (“inertia bias”). This is why default options constitute such a powerful “nudge”<sup>63</sup>.

Fifthly, regarding effectiveness, unless the impact of ‘nudges’ is harnessed by means of an opt-out solution, experience shows that significant but low-value claims will not give rise to viable court proceedings, as illustrated in the United Kingdom by the claim against JJB Sports for price fixing in respect of football shirts<sup>64</sup>. In other words, the effectiveness principle, recalled in Article 3 of the proposed Directive on actions for damages<sup>65</sup>, supports the

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<sup>61</sup> The European Consumer Consultative Group, in its Opinion on private damages actions (2010), noted Europe’s recent experience that the rate of participation in opt-in procedure for consumer claims was less than one percent, whereas under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal).

<sup>62</sup> A. Stadler, “Group Actions as a Remedy to Enforce Consumer Interests”, in F. Cafaggi and H.W. Micklitz (eds.), *New Frontiers of Consumer Protection – Interplay between Private and Public Enforcement*, Intersentia, 2009, p. 305, at p. 325-27. The German rules on the disgorgement of illegal profits in Sec. 10 Unfair Competition Act and Sec. 34a, 33 Antitrust Act are, however, good illustrations of how such regulations should *not* be designed. Private organisations that have legal standing to bring such actions must be given some financial incentives to litigate, given especially the large costs risk if the loser pays rule applies.

<sup>63</sup> C. Sunstein and R. Thaler, *Nudge*, Yale University Press, 2008, esp. pp. 1 and 105 sq. In the field of consumer policy, the EU legislator draws on such insights, for instance in Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ 2011 L 304/64 (esp. art 22).

<sup>64</sup> UK Competition Appeal Tribunal, Case 1022/1/1/03, *JJB Sports PLC v. Office of Fair Trading*.

<sup>65</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,

adoption of opt-out mechanisms by Member States. If the effectiveness principle is taken seriously, it seems paradoxical to insist that opt-in should be the default solution and that Member States need to adduce special justifications when they adopt (more effective) opt-out mechanisms.

Sixthly, on the need for empirical evidence, differing views regarding the comparative merits of opt-in and opt-out collective redress structures are expressed in the literature. By and large, they are supported by legal and political arguments. What is so far missing is empirical research into the competing models, which is an essential precondition of further progress in this longstanding debate<sup>66</sup>. Without further monitoring and reporting by the Commission of the way collective redress develops over the period to 2017, it would be premature to determine the best approach to collective redress to recommend to the Member States. Empirical evidence – beyond the famous UK *JJB Sports* case – will be necessary with respect to the behaviour of individual claimants when liability has been established in collective redress proceedings or when a collective settlement has been achieved. Every opt-out mechanism applied to claims for damages ultimately involves an opt-in procedure at the distribution stage of proceedings. If the individual loss is small, those theoretically entitled to claim compensation may choose not to do so or may have difficulty in proving their entitlement in practice. Therefore, a decision on the best approach on opt-in/opt-out must also include a debate on the role of deterrence<sup>67</sup>, the proper relationship between private and public enforcement, and the pros and cons of *cy-près* solutions<sup>68</sup>.

Finally, regarding the policy background, the dilemma remains how to choose between opt-out and opt-in systems of collective redress. Opt-out is more likely to produce results, but allows lawyers and third party funders, and others unharmed by the unlawful conduct in question, to make windfall profits from their involvement. Conversely, with opt-in collective redress, inertia is likely to limit the number of claims by those actually harmed, and there is little incentive for relevant third parties to become involved, because the size of the cake is reduced.

#### *Implementation in Member States:*

While the Commission's Recommendation clearly favours the opt-in system as the default option, it also recognises that too rigid an approach to the structuring of collective redress may not be in the interests of justice. One possible way for Member States to implement the Recommendation would be to permit their courts to adopt the form of collective redress

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COM(2013) 404 final. The finally adopted text of the Directive (2014/104/EU of 26 November 2014) refers to this principle in Article 4.

<sup>66</sup> R. Mulheron has done some research in this respect: R. Mulheron, "The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis", *Columbia J. of European L.*, vol. 15, 2009, p. 409-453.

<sup>67</sup> S. Issacharoff and G.P. Miller, "Will Aggregate Litigation Come to Europe?", fn. 22, p. 187.

<sup>68</sup> C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems*, Hart Publishing, 2008, pp. 118-123; R. Mulheron, *The Class Action in Common Law Legal Systems, A Comparative Perspective*, Hart Publishing, 2004; R. Mulheron, *The Modern Cy-près Doctrine*, Hart Publishing, 2006.

procedure best suited to the particular circumstances of the case at hand, as under the new Belgian legislation<sup>69</sup>. This is a “third way” model, which is especially interesting at the present time, at which more data is needed on the operation of both opt-in and opt-out in Europe. While it would be for Member States to decide how to implement such a model, it is suggested that the choice between opt-in and opt-out should be made by national courts taking into account the specific features of each case, including such matters as:

- the characteristics of the claimants (big business, SMEs, trade associations, NGOs such as Consumer Associations, large numbers of individual consumers, or public bodies);
- the nature of the claim (for example, whether the claim is for high value damages suffered by a small number of large business concerns, low value damages suffered by a large number of end consumers, damages to mixed large and small business customers belonging to a trade association, or damages to identifiable residents in a street with a claim against local or central government); and,
- the overall context of the proceedings (including, for example, any payment into court by way of an offer of compensation or the initiation of "Italian torpedo" actions in other jurisdictions as a delaying tactic<sup>70</sup>).

Where a Member State follows the approach set out in the Recommendation which gives preference to the opt-in model but permits opt-out when justified in the interests of the sound administration of justice, the court's case management powers should permit it to decide on the best structure in the light of the particular circumstances of the case in question.

Where a Member State gives preference to the opt-out model<sup>71</sup>, it should equally make it clear<sup>72</sup> that other structures may be selected where justice requires, including an opt-in structure.

It follows that the Member States could implement the Commission's Recommendation by introducing a new mechanism, or streamlining an existing mechanism, to ensure that effective and efficient class (or group) actions are readily available before their courts without unduly prejudicing the rights of any interested parties. A way to ensure that class (or group) actions are effective and efficient is to give the national courts full case

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<sup>69</sup> Loi du 28 mars 2014 - Loi portant insertion d'un titre 2 " De l'action en réparation collective " au livre XVII " Procédures juridictionnelles particulières " du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique, Moniteur Belge, 29 April 2014, n°2014011217, p. 35201.

<sup>70</sup> As to "Italian torpedo" actions, see *Véron*, ECJ Restores Torpedo Power, IIC 2004, 638; *Wittwer*, Eur. L. Rptr. 2004, 49; *Hartley*, in: Nafziger/Symeonides (eds.), Essays in Honor of A.T. von Mehren, 2002, 73.

<sup>71</sup> As under a current proposal in the UK, favouring an opt-in mechanism with respect to group members domiciled outside the UK: Draft Consumer Rights Bill (Cm 8657).

<sup>72</sup> As under the Draft Consumer Rights Bill in the UK.

management powers to enable them to determine the most appropriate form of collective redress procedure in the individual case.

### *Collective alternative dispute resolution and settlements*

25. The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial, taking also into account the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

26. The Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation. Use of such means should depend on the consent of the parties involved in the case.

27. Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of an alternative dispute resolution procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure.

28. The legality of the binding outcome of a collective settlement should be verified by the courts taking into consideration the appropriate protection of interests and rights of all parties involved.

#### *Comments:*

As noted in the Comments to Chapter IV above, the ELI recommends that these provisions on collective settlements and ADR should also apply to injunctive collective redress, even though this chapter of the Recommendation is entitled “Specific principles relating to compensatory collective redress”.

As regards point 28, the ELI notes that settlements are the most common way in which mass disputes are resolved. A court review of the settlement, which is simply a form of contract, is not necessary in traditional two-party litigation, in which claimant and defendant are expected to negotiate in their own respective interests. Collective settlements negotiated by a representative of the claimant class require judicial oversight, however, as there is the potential for principal-agent conflicts and the group of absent claimants is unable to monitor effectively the representative’s performance. Therefore, it is consistent with international standards of mass litigation that collective settlements should be approved by the court in order to have binding effect on group members<sup>73</sup>. However, the ELI submits that the text of

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<sup>73</sup> Rule 23 (e) US Federal Rules of Civil Procedure; Art. 907 Dutch Civil Code (for settlements under the Dutch Collective Settlement Act); Sec. 26 Swedish Group Litigation Act; Art. 19 Polish Group Litigation Act; Sec. 18 German Capital Market Model Case Act (2012); Sec.18-19 Israel Class Action Law (2006); Ch. 6 Sec. 29 Ontario Class Proceedings Act 1992, Sec. 35 Class Action Proceedings Act British Columbia, 1996; Class Action Proceedings Act SNS Sec. 38 (Nova Scotia); Sec. 33V Federal Court of Australia Act; Sec. 33A Victoria Supreme Court Act (Australia); Sec. 173 New South Wales Civil Procedure Act (part 10); Art. XVII 44 Belgian Draft for Collective Redress Proceedings (2014).



point 28 is not clear with respect to its scope of application and the criteria to be applied by courts.

First, a distinction should be drawn between the outcomes of ADR and settlements negotiated during formal court proceedings. The requirement for court approval applies only to the latter and not the former. ADR is a mechanism outside the court system and it would be detrimental to its operation for its outcomes to be subject to court approval regarding the appropriateness of the protection given to the interests and rights of all parties involved. In any case, court approval is not necessary as the outcomes of ADR will normally have no binding effect on the absent group members. Although the context of point 28 (under the heading “Collective alternative dispute resolution and settlements”) may be interpreted as indicating that it refers to collective settlements achieved as the outcome of ADR, that interpretation is undesirable and was probably not the intention of the Commission. The ELI accepts, however, that court approval of all collective settlements negotiated in the course of judicial proceedings should be required as a general rule. It is an absolutely necessary safeguard of the interests of absent claimants<sup>74</sup>.

Secondly, the Recommendation requires a verification of the “legality” of the binding outcome of the collective settlement and thus seems to restrict the scope of examination to mere formalities or to the question of whether the mass settlement violates existing rules. It is not clear why the expression “legality” has been chosen as the benchmark for the court’s review and it is not acceptable for either settlements achieved during ADR proceedings or settlements in the course of contentious litigation. Strictly speaking, it is not even necessary to verify the “legality” of a settlement because illegal settlements will normally be null and void anyway.

The main risk involved in collective settlements is certainly not the violation of procedural or substantive law. Class action and collective redress regulations all over the world require a review of the settlement by the court because of the potential principal-agent conflicts arising in the negotiation process and because of the risk that the settlement might not take into consideration the different or even conflicting interests of the group members<sup>75</sup>. Depending on the mechanism by which the mass litigation is funded, the remuneration granted in the settlement to the lawyers may be another issue in respect of which judicial scrutiny and approval is justified. Consequently, courts should first of all assess the reasonableness and fairness of the terms of the settlement, not its legality (which can probably be denied only under extraordinary circumstances).

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<sup>74</sup> See the contributions by R. Marcus, M. Legg, J. Kalajdzic, I. Tzankova and D. Hensler in C. Hodges and A. Stadler (eds.), fn. 35.

<sup>75</sup> J. Coffee, “Class Wars: The Dilemma of the Mass Tort Class Action”, *Col. J. Rev.*, vol. 95, 1995, p. 1344; M. Faure, “CADR and settlement of claims – a few economic observations”, in C. Hodges and A. Stadler (eds.), fn. 35, pp. 54-59.

“Legality” can also hardly be interpreted as allowing the court to withhold its approval if the rights granted under the settlement do not correspond with the factual circumstances and legal entitlements of the group members. Compromise is the essence of settlement and therefore group members will often not receive full compensation under the agreed terms. Nevertheless, the settlement might constitute a fair and reasonable resolution of the collective dispute, having regard to the stage of the proceedings at which it is reached and the risks involved in seeking to establish liability before the court.

*Implementation in Member States:*

Though, strictly speaking, points 25 to 28 apply only to collective damages claims, Member States should extend their application to injunctive collective redress as well.

Member States should clearly distinguish between the outcomes of ADR and settlements, negotiated during formal court proceedings. A requirement for court approval would be contrary to the operation of ADR and is not necessary as the outcomes of ADR will normally have no binding effect on absent group members. All settlements negotiated in the course of judicial proceedings should require court approval so as to protect the rights and interests of absent group members. When scrutinising the proposed settlement courts should not only consider its legality, but also the fairness and adequacy of the settlement, including the remuneration to be paid under its terms to professional advisers, with respect to all group members.

### *Legal representation and lawyers' fees*

29. The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.

30. The Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.

#### *Comments:*

The ELI accepts the desirability of avoiding remuneration structures that promote unnecessary litigation (point 29).

As regards the prohibition of contingency fees which risk creating an incentive for unnecessary litigation (point 30), the ELI notes that contingency fees – which may cover the preparation and submission of the claim, the gathering of evidence, representation in court, and general case management – are considered to be a useful method of financing legal actions in some Member States, as well as in the United States<sup>76</sup>, whereas other Member States consider the prohibition of contingency fees to be an important safeguard against abusive litigation<sup>77</sup>. Whether contingency fees in fact encourage frivolous claiming remains to be conclusively demonstrated, bearing in mind in particular that European legal culture is very different from that in the United States<sup>78</sup>. It should in any case be noted that the “loser pays” principle (point 13) itself provides a disincentive to meritless claims in Europe.

Point 30 presupposes that contingency fees may be made available subject to certain conditions, but these are not explicitly explained. The “boiler-plate” character of the formula employed might perhaps be explained by the fact that, in a non-binding document, the Commission did not want to stipulate in fixed terms the border line between lawful and unlawful fee arrangements.

In the opinion of the ELI, the Commission should seek to inform its 2017 review of the Recommendation's implementation by reviewing the research that has been published on the impact of contingency to date, as well as seeking empirical evidence from Member States

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<sup>76</sup> In the US, in around 87% of all torts and 53% of all contractual issues claimants retain their lawyer on a contingency basis. See H. M. Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation*, Oxford, Oxford University Press, 1990.

<sup>77</sup> On which see M. G. Faure, F. J. Fernhout and N. J. Philipsen, “No Cure, No Pay and Contingency Fees”, in M. Tuil and L. Visscher (eds.), *New Trends in Financing Civil Litigation in Europe, A Legal, Empirical and Economic Analysis*, 2010, p. 33.

<sup>78</sup> An empirical study conducted by two American scholars challenges the view that contingent fees encourage the filing of low-quality suits. It argues that hourly fees encourage the filing of low-quality suits and increase the time to settlement (i.e. contingency fees *increase* legal-quality and decrease the time to settlement). See E. Helland and A. Tabarrok, “Contingency Fees, Settlement Delay and Low-Quality Litigation: Empirical Evidence from Two Datasets”, *Journal of Law, Economics and Organization*, vol. 19, no. 2, 2003, p. 517.

(under their obligation to collect annual statistics: para 39 of the Recommendation) about the operation of such contingency fee systems that are currently available for collective redress claims. One aspect that could usefully be highlighted is whether any adverse effects attributable to contingency fees are limited if the lawyer's "success fee" is limited to a percentage uplift on the regular or to a particular proportion of the damages.

In any case, from the constitutional point of view, it would be useful to add to point 30 a provision saying that contingency fees are permitted if the claimant party would not be able to enforce its rights without such an arrangement.

### *Prohibition of punitive damages*

31. The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.

#### *Comments:*

Punitive damages are not intended to compensate for harm done but are awarded over and above any compensatory or nominal damages to which the claimant is entitled. The claimant receives all or some portion of the punitive award. Thus, punitive damages necessarily lead to overcompensation. The formulation employed in point 31 – “punitive damages leading to overcompensation in favour of the claimant party of the damage suffered should be prohibited” – is therefore unfortunate.

In the ELI’s opinion, this drafting deficiency indicates a measure of ambivalence on the part of the Commission towards punitive damages which prevented it from outlawing punitive damages altogether. The ELI notes that such a prohibition would not be in line with either existing national laws or European Union law, which does not yet treat the issue of punitive damages in a clear fashion:

a) The common law countries of England and Wales, Northern Ireland and Ireland, and the mixed system of Cyprus, provide for punitive damages in their respective legal systems. In England, for instance, punitive “exemplary damages” are authorised in the case of oppressive, arbitrary or unconstitutional actions by government servants and torts committed for profit.

b) At EU level, the availability of punitive damages is accepted in a number of legislative provisions. Thus, Recital 32 of the Rome II Regulation reads:

*“In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy of the forum”<sup>79</sup>.*

The wording of this provision is quite different from that of point 31 of the Recommendation. Recital 32 enables the CJEU to draw the line as to what amounts to an excessive non-compensatory award, thereby defining the boundaries of public

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<sup>79</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations.

policy, whereas the wording of the Recommendation is too narrow to allow such an interpretation.

The Rome II Regulation is not the only European Union law which, to some extent, permits punitive damages. Article 18 of Regulation No. 1768/95 on the agricultural exemption, for example, provides that:

*“1. A person referred to in Article 17 may be sued by the holder to fulfill his obligations pursuant to Article 14(3) of the basic Regulation as specified in this Regulation.*

*2. If such person has **repeatedly and intentionally** not complied with his obligation [...], the liability to compensate the holder for any further damage [...] shall cover at least **a lump sum calculated on the basis of the quadruple average amount charged for the licensed production** of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage” (emphasis added).*

Under this provision the right holder is thus awarded a multiple of the actual loss incurred. This overcompensation of the victim is punitive in nature.

Similarly, Regulation 261/2004 concerning air passengers’ rights establishes a system of fixed compensation regardless of actual damage, providing a further example of European Union law’s openness to super-compensatory damages.

c) There is a scholarly debate as to whether the CJEU promotes the granting of punitive damages. In its decision of 10 April 1984 (*von Colson* decision)<sup>80</sup>, the Court stated:

*“The principle of the effective transposition of the directive requires that the sanctions must be of such nature as to constitute appropriate compensation for the candidate discriminated which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on an expectation (‘Vertrauensschaden’) is not sufficient to ensure compliance with that principle [...]*

*If a Member State chooses to penalize breaches [...] by the award of compensation, then in order to ensure that it is effective and that it has a **deterrent effect**, that compensation must in any event be adequate in relation to the damage sustained and **must therefore amount to more than purely nominal compensation** [...]” (emphasis added).*

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<sup>80</sup> CJEU, 10 April 1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, ECR 1984, p. 1891.

One might infer from this decision that:

- the CJEU leaves room to the Member States to choose appropriate measures to remedy violations, including punitive damages, and
- damages for discrimination cannot be explained within the traditional compensatory framework and may be regarded as an example of the award of punitive damages<sup>81</sup>.

d) According to the EU principle of equivalence, remedies made available for the protection of EU rights by national law must not be less favourable than those available for similar domestic rights. In *Brasserie du Pêcheur SA v. Federal Republic of Germany and Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (no. 4)* (“*Brasserie du Pêcheur and Factortame*”) it was therefore established that:

“(…) it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law”<sup>82</sup>.

Moreover, in its famous judgment *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, the CJEU held that national courts can award punitive damages for violations of Community law<sup>83</sup>.

The above analysis demonstrates that there is no clear position as regards punitive damages in Europe. In the absence of a clear stance at either EU or Member State level, the ELI recommends that the Commission expressly reconsiders point 31 in the course of its 2017 review of the Recommendation’s implementation to ascertain whether or not it remains consistent with the law in the EU and in the Member States.

#### *Implementation in Member States:*

The availability of punitive damages cannot be regarded as an exceptional phenomenon in Europe. In the current scholarly debate, there is no consensus as to whether punitive damages are *a priori* in conflict with the principles of European law<sup>84</sup>. In the meantime, the

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<sup>81</sup> V. Behr, “Myth and reality of punitive damages in Germany”, *Journal of Law and Commerce*, vol. 24, 2004, p. 197, 215–216; N. Jansen and L. Rademacher, “Punitive Damages in Germany”, in H. Koziol and V. Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, 2009, pp. 84–85.

<sup>82</sup> Joined cases CJEU 5 March 1996, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others*, ECR 1996, p. 1029, paragraph 90.

<sup>83</sup> Joined cases CJEU 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v. Assitalia SpA*, ECR 2006, p. 6619.

<sup>84</sup> B. A. Koch, “Punitive Damages in European Law”, in H. Koziol and V. Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, fn. 77, p. 197.

Member States should retain the freedom to choose whether they recognise punitive damages and to what extent.



### *Funding of compensatory collective redress*

32. The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.

#### *Comments:*

The ELI supports the substance of point 32 of the Recommendation, allowing third party funding of representative litigation (including contingency fees) only if it is regulated by a “public authority”. However, it is unclear whether the courts and/or Bar Associations are public authorities as referred to in point 32. If a court in a particular case approves an opt-out settlement that apportions a percentage of the award to the funder, in the ELI’s view that should also be considered regulation by a public authority within the meaning of the Recommendation.

More generally, the ELI notes that the Recommendation does not make a clear distinction between situations involving the assignment of claims to the third party fund provider and those not involving the assignment of claims. That model is legally accepted and widely used in some jurisdictions, but problematic in others<sup>85</sup>. It should also be observed that, when the assignment of claims model is used, the funder becomes owner of the claims and the action is no longer representative<sup>86</sup>.

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<sup>85</sup> It can be especially problematic in common law jurisdictions where the principles of champerty and maintenance apply.

<sup>86</sup> However, the courts in some Member States, like Germany for example, take the position that despite the full assignment of a claim to the claimant the action can still be deemed to be a representative action if the assignor keeps a strong economic interest in the outcome of the litigation (e.g. due to a promised share of the damages awarded). In the famous *Cement cartel* case, the Landgericht Düsseldorf recently applied a very strict test to the assignment of damages claims to the Belgian assignee, “Cartel Damage Claims”, and declared the assignment void:  
[http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg\\_duesseldorf/j2013/37\\_O\\_200\\_09\\_Kart\\_U\\_Urteil\\_20131217.html](http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html)

### *Collective follow-on actions*

33. The Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. If the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded.

34. The Member States should ensure that in the case of follow-on actions, the persons who claim to have been harmed are not prevented from seeking compensation due to the expiry of limitation or prescription periods before the definitive conclusion of the proceedings by the public authority.

#### *Comments:*

The Recommendation stipulates that collective redress actions should start, as a general rule, only after the definitive conclusion of any proceedings of the public authority which were launched before commencement of the private action. The ELI observes that a reasonable reading of this provision contemplates that it refers to the proceedings of the public authority and not those of the subsequent appellate authorities.

## Chapter VI General information

### *Registry of collective redress actions*

35. The Member States should establish a national registry of collective redress actions.

36. The national registry should be available free of charge to any interested person through electronic means and otherwise. Websites publishing the registries should provide access to comprehensive and objective information on the available methods of obtaining compensation, including out of court methods.

37. The Member States, assisted by the Commission should endeavour to ensure coherence of the information gathered in the registries and their interoperability.

#### *Comments:*

The ELI believes that, irrespective of the question whether the Member States implement only opt-in collective redress or also allow opt-out proceedings, it is pivotal that information about pending actions is distributed in the best possible way. Particularly in cross-border cases, access to information across national borders is important for the group members' decisions whether to opt in or out. Furthermore, claimants need a platform for the exchange of information in order to cooperate better and consolidate their efforts to obtain damages or an injunction.

Point 35 asks Member States to establish a national registry of collective redress actions, and the Commission promises to assist in ensuring the coherence of the information gathered and the interoperability of the registers. In the ELI's opinion, the interoperability of the national registers is not enough in itself. In its proposal for a reform of the European insolvency regulation<sup>87</sup> the Commission envisaged national registers with access via the European e-Justice portal. With uniform access of that nature it will not be necessary to search separate national registers. An even better solution could be a register operated at the European level implemented by Union legislation supplementing the Recommendation.

Given that there is no amendment to the Brussels I Regulation with respect to international jurisdiction for collective redress claims, and given further that the Member States are very likely to implement different instruments providing collective redress, forum shopping will be of increasing importance in the future<sup>88</sup>. In the absence of uniform rules on the legal standing of representative entities, there is a high probability that cross-border mass torts will be picked up by a variety of representative associations in different Member States. As a consequence, and depending on jurisdiction, there may be parallel proceedings against the same defendant in several courts and on behalf of different groups of tort victims. Therefore

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<sup>87</sup> COM (2012) 744 final, p. 8.

<sup>88</sup> See above p. 32.

it is very important to allow the exchange of information on these proceedings for courts and parties involved via easily accessible registers.

*Implementation in Member States:*

Member States should ensure the application of common criteria in the structure of the national registers in order to allow effective searching of them in cross-border cases.

## Chapter VII Supervision and reporting

38. The Member States should implement the principles set out in this Recommendation in national collective redress systems by 26 July 2015 at the latest.

39. The Member States should collect reliable annual statistics on the number of out-of-court and judicial collective redress procedures and information about the parties, the subject matter and outcome of the cases.

40. The Member States should communicate the information collected in accordance with point 39 to the Commission on an annual basis and for the first time by 26 July 2016 at the latest.

41. The Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed.

### *Final provisions*

42. The Recommendation should be published in the *Official Journal of the European Union*.

### *Comments:*

The ELI would underline the importance of the Commission assessing the implementation of the Recommendation in its 2017 review (as prescribed by point 41) on the basis of the fullest possible information about the operation of collective redress procedures in practice. It urges Member States to provide reliable annual statistics not just about the matters specified in point 39 (viz. the number of out-of-court and judicial collective redress procedures and information about the parties, the subject matter and outcome of the cases) but also about the relative numbers of opt-out and opt-in claims, and the extent of the use of contingency fees. These aspects are clearly of major significance to the Commission's specific evaluation, in accordance with point 41, of the Recommendation's impact on access to justice, the right to obtain compensation and the need to prevent abusive litigation.

## **SECTION II**

Assessment of the  
Directive of the European Parliament and of  
the Council on Certain Rules Governing  
Actions for Damages under National Law for  
Infringements of the Competition Law  
Provisions of the Member States and of the  
European Union  
(COM(2013) 404 final)

## INTRODUCTION

The Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014/104/EU), approved by the European Parliament on 17 April 2014 and by the Council on 10 November 2014, is the result of a long process. This process started back in 2005, when the European Commission published its Green Paper on Damages actions for breach of the EC antitrust rules. The publication highlighted what were considered the main obstacles to a more effective system of antitrust damages actions. Quantification of harm, the absence of clear rules on the passing-on defence or the questionable probative value of NCA's decisions were some of the challenges this Green Paper identified as problems to be solved by future European legislation. Some concrete policy proposals were suggested in that regard by the European Commission, the European Parliament and the European Economic and Social Committee.

But it was only in 2011 when more concrete steps were taken, especially with the public consultation "Towards a coherent European approach to collective redress" held by the European Commission with the goal of identifying common legal principles on collective redress and exploring the way those common principles could fit into the EU legal system and into the national legal orders of the Member States. The consultation aimed to improve the enforcement of EU legislation and the protection of the rights to victims. Another milestone in this process was the resolution of the Meeting of the Heads of the European Competition Authorities of 23 May 2012, which emphasised the importance of the protection of leniency material in the context of civil damages actions. The support to the idea that public enforcement is essential in the competition field also came from the European Parliament whose response to the mentioned public consultation encouraged the Commission to take action in that direction.

With this background, on 11 June 2013 the European Commission issued the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013) 404 final). This Proposal for a Directive introduced various significant measures such as a rebuttable presumption that any cartel infringement has caused harm, a power for national courts to order the defendant or third parties to disclose evidence, and the recognition of infringement decisions by national competition authorities before every national court in the EU. The proposal was accompanied by a Communication and a Practical Guide on how to quantify harm in antitrust cases. In October 2013, the European Economic and Social Committee published its first opinion on the proposed Directive, which was followed by a report from the EP's Committee on Economic and Monetary Affairs, where some amendments were suggested. The Council of the European Union gave its approval to the proposed Directive but agreed on a modified text on 3 December 2013 as its common position, suggesting amendments regarding the value of NCA's decisions and other issues. The original text proposed by the European Commission was then subject to opinions from the EP's Committee on the Internal Market and Consumer Protection and from the Committee on Legal Affairs. Before the final text was put to a vote at the EP, the European Economic and Social Committee published a second opinion on the proposed Directive. The text of the

Directive was finally adopted in the Plenary Session of the European Parliament of 17 April 2014 and by the Council on 10 November 2014. It was signed on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014 (2014/104/EU).



## EXECUTIVE SUMMARY

The proposed Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013) 404 final), approved with modifications on 10 November 2014, introduces various significant measures such as a more open system of disclosure of evidence, the facilitation of indirect purchasers actions and the balancing between protecting leniency programs and encouraging private actions. It includes a rebuttable presumption that any cartel infringement has caused harm, a power for national courts to order the defendant or third parties to disclose evidence, and the requirement for national courts to allow follow-on actions based on infringement decisions of their own National Competition Authorities (NCAs). The proposed Directive was accompanied by a Communication and a Practical Guide on how to quantify harm in antitrust cases.

At the same time, the non-binding Recommendation issued by the European Commission (discussed in detail in Section I of this Statement) prescribes that all Member States should have collective redress mechanisms in place for all areas of Union law conferring rights and obligations on individuals and legal entities (as many currently do not) and outlines several principles to which such mechanisms should adhere. This subject is of particular importance in the field of competition law, as anti-competitive practices can often result in relatively small amounts of damage to large groups of consumers. The Directive deals with actions for damages in antitrust cases but does not cover collective redress which is left to the Recommendation.

### *The ELI's work on the Directive*

This section of the Statement includes the concrete suggestions that the ELI communicated to European Institutions during the legislative process aiming to improve the effectiveness of competition damages claims in national courts in the light of the Directive and to maximise its practical utility, while endorsing the Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU).

The Statement contains comments on the text of the Directive originally proposed by the European Commission (COM(2013) 404 final) ("the proposed Directive"). Only those articles of the proposed Directive for which an alternative wording was suggested or whose scope and interpretation was found to be potentially controversial have been commented upon. Those articles are revised showing the original wording proposed by the European Commission in one column and the alternative wording suggested by the ELI adjacently. Proposals for alternative wording are followed by a summary of the reasons justifying them. The final text of the Directive (2014/104/EU), adopted by the European Parliament (on 17 April 2014) and the Council (on 10 November 2014) is attached as an annex to this Statement.

In general terms, the ELI agrees with the approach of the European Commission and welcomes this Directive, since it will contribute to a more coherent and stronger legal framework for damages. An example of this contribution is the minimum limitation period for damages claims, positively considered by the ELI as a guarantee that will significantly improve access to justice for victims of competition law infringements.

The main suggestions made by the ELI refer to disclosure of evidence, effect of national decisions, and passing-on of overcharges.

On disclosure of evidence, the ELI considers that private enforcement should not compromise the effectiveness of public enforcement of competition law.

Regarding the effect of national decisions, the ELI supports the proposal of the Commission to give binding effect to the finding of infringement in NCAs' decisions without this giving binding effect to any findings of fact which relate to the issues of damage or causation. This issue should be addressed again as confidence in the European Competition Network grows.

For passing-on of overcharges, the need to establish transnational rules in order to allow consolidated actions (direct and indirect purchasers) is highlighted.

Finally, as a general comment on the Directive, the ELI welcomes the existing funding programmes for training in EU Competition Law for judges. In any case, it invites the European Commission to consider the establishment of new funding programmes in EU Competition Law, focused on this new Directive.

## SUGGESTED AMENDMENTS AND COMMENTS

### Chapter II Disclosure of evidence

#### *Article 5*

#### *Disclosure of evidence*

##### Original text

##### Suggested wording

1. Member States shall ensure that, where a claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he, or those he represents, has suffered harm caused by the defendant's infringement of competition law, national courts can order the defendant or a third party to disclose evidence, regardless of whether or not this evidence is also included in the file of a competition authority, subject to the conditions set out in this Chapter. Member States shall ensure that courts are also able to order the claimant or a third party to disclose evidence on request of the defendant. This provision is without prejudice to the rights and obligations of national courts under Council Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts order the disclosure of evidence referred to in paragraph 1 where the party requesting disclosure has

(a) shown that evidence in the control of the other party or a third party is relevant in terms of substantiating his claim or defence; and

(b) specified either pieces of this evidence or categories of this evidence defined as precisely and narrowly as he can on the basis of reasonably available facts.

3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

3. Member States shall ensure that national courts limit disclosure of evidence to that which is ***necessary and*** proportionate. In determining whether any disclosure requested by a party is ***necessary and*** proportionate, national courts shall consider the legitimate interest of all parties and third parties concerned. They shall, in

(a) the likelihood that the alleged infringement of competition law occurred;

(b) the scope and cost of disclosure, especially for any third parties concerned;

(c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; and

(d) in cases where the infringement is being or has been investigated by a competition authority, whether the request has been formulated specifically with regard to the nature, object or content of such documents rather than by a non-specific request concerning documents submitted to a competition authority or held in the file of such competition authority.

particular, consider:

(a) the likelihood that the alleged infringement of competition law occurred;

(b) the scope and cost of disclosure, especially for any third parties concerned;

(c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; and

(d) in cases where the infringement is being or has been investigated by a competition authority, whether the request has been formulated specifically with regard to the nature, object or content of such documents rather than by a non-specific request concerning documents submitted to a competition authority or held in the file of such competition authority.

Alternative I: ***(e) the effective public enforcement of competition law.***

Alternative II: ***When assessing the necessity and proportionality of a disclosure order or upon request of a competition authority, national courts shall consider the interest of effective public enforcement of competition law.***

4. Member States shall ensure that national courts have at their disposal effective measures to protect confidential information from improper use to the greatest extent possible whilst also ensuring that relevant evidence containing such information is available in the action for damages.

5. Member States shall take the necessary measures to give full effect to legal privileges and other rights not to be compelled to disclose evidence.

6. Member States shall ensure that, to the extent that their courts have powers to order disclosure without

hearing the person from whom disclosure is sought, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been heard by the court.

7. Evidence shall include all types of evidence admissible before the national court seised, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored.

8. Without prejudice to the obligation laid down in paragraph 4 and the limits laid down in Article 6, this Article shall not prevent the Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

*Comments:*

The provisions in Articles 5 – 8 of the proposed Directive are aimed at addressing the so-called "information asymmetry" in competition law private claims, without reducing the incentives of undertakings to apply for cartel leniency or to engage in settlement procedures.

The proposed Directive provides that Member States must ensure that national courts can order proportionate disclosure of evidence in competition law cases from defendants, claimants or third parties, subject to certain conditions, and that appropriate confidentiality measures be available.

However, the proposed Directive introduces limits to the disclosure of evidence included in the file of the Commission or an NCA. It provides for two categories of protected documents:

- **Absolute protection** for two types of documents which are considered to be crucial for the effective operation of the public enforcement regime, namely voluntary leniency corporate statements and settlement submissions. National courts "cannot at any time" order disclosure of these documents.
- **Temporary protection** for documents the parties specifically prepared for the purpose of the public enforcement proceedings (for example, the parties' replies to the competition authority's requests for information) or those documents which the authority has drawn up in the course of its proceedings (for example, the Statement of Objections). These documents can be disclosed for the purpose of a competition law damages action only after the competition authority has closed its proceedings.

These protective measures also apply in cases where a party has acquired the protected documents through access to the file of a competition authority (for example, in the exercise of the parties' rights of defence in the context of public enforcement proceedings).

Clarifying the type of evidence that may/may not be potentially available to damages claimants is welcome news for leniency applicants who, following the *Pfleiderer* judgment<sup>89</sup>, have been faced with uncertainties as to whether national courts will order disclosure of leniency materials at the crucial time of making a decision whether to blow the whistle. However, it is not clear whether this proposal is consistent with the recent judgment of the Court of Justice in the *Donau Chemie* case<sup>90</sup>, which ruled that EU countries cannot adopt national laws that "systematically" refuse access to documents in the file of NCAs. Overall, it is too early to say whether the fact that the protection from disclosure remains relatively limited will deter whistle-blowers from coming forward, in particular as private actions increase.

Regarding Article 5 of the proposed Directive, the ELI would like to contribute the following:

*Paragraph 2 (a) and paragraph 3:* There is an inconsistency between the Explanatory Memorandum and the Preamble on the one hand and Article 5 paragraphs 2 and 3 of the proposed Directive on the other. Although Section 4.2 of the Explanatory Memorandum and Recital 14 ask for the disclosure of evidence to be subject to a strict and active judicial control as to its *necessity and proportionality*<sup>91</sup>, the proposed Directive uses the term "relevant" in terms of substantiating the disclosure claim and only refers the disclosure request being required to be "proportionate". This may not only be a matter of aesthetics but also a matter of substance. As the national concepts of "proportionality" vary in detail and as it is not entirely clear what the proposed Directive precisely means by "proportionality", the ELI suggests reconsidering this article and providing more consistency with Recital 14. In any case, it seems necessary to make clear that the evidence to be disclosed must be "necessary" for the court's decision. "Necessity" could either be part of the "proportionality" (and explicitly mentioned to be so) or be a separate requirement to be met. If the rule makers believe that the notion of "necessity" is conceptually identical to or is part of the notion "proportionality", then it is proposed that the word "necessity" be deleted from Recital 14: "*Relevant evidence should be disclosed upon decision of the court and under its strict control, especially as regards the necessity and proportionality of the disclosure measure*". For a better clarification, the Recital should mention that "necessity" is part of the proportionality concept. However, if it is crucial for the word

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<sup>89</sup> Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161.

<sup>90</sup> Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, NYR, para. 43.

<sup>91</sup> According to the Explanatory Memorandum, "disclosure of evidence held by the opposing party or a third party can only be ordered by judges and is subject to strict and active judicial control as to its necessity, scope and proportionality". According to Recital 14, "Relevant evidence should be disclosed upon decision of the court and under its strict control, especially as regards the necessity and proportionality of the disclosure measure".

"necessity" to remain as a separate requirement, it is proposed that this section of Article 5 paragraph 3 be re-phrased as follows: *"In determining whether any disclosure requested by a party is necessary and proportionate, national courts shall consider the legitimate interest of all parties and third parties concerned"*.

*Paragraph 3:* In consistency with the Explanatory Memorandum (Section 1.2) and European Parliament resolutions, private enforcement shall not compromise the effectiveness of public enforcement of competition law. In this light, a specific provision may be necessary to make this statement clearly. The ELI thus proposes the introduction of a separate paragraph, which may be phrased as follows: *"When assessing the necessity and proportionality of a disclosure order or upon request of a competition authority, national courts shall consider the interest of effective public enforcement of competition law"*. Thus, it becomes clear that courts must take into consideration the interest of effective public enforcement when making any disclosure order. However, competition authorities should also have the right to draw the court's attention to this aspect at any time during the litigation. Alternatively, a separate section (e) may be added to paragraph 3: *"(e) the effective public enforcement of competition law"*. A similar approach is adopted by the Council<sup>92</sup>.

- a. Consideration should be given to clarifying whether the term "third party" also covers public authorities of the Member State (other than or including competition authorities)<sup>93,94</sup>.
- b. If the term "third party" refers also to competition authorities, access to documents in their files following a disclosure order by a national court addressed to a competition authority should be granted without prejudice to the confidential information of the parties to the infringement<sup>95</sup>, especially in cases where a final and irrevocable infringement decision has not yet been issued<sup>96,97</sup>. The disclosure of such information may jeopardise the public enforcement of competition rules and the effectiveness of the procedures of competition

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<sup>92</sup> See Article 6 para. 2 of its general approach issued on 3 December 2013.

<sup>93</sup> Under national procedural rules for civil actions (as is for example the case in Greece) it may be that disclosure can be ordered by the national court also with respect to documents in the possession of public authorities, public bodies and the public sector in general.

<sup>94</sup> This is also relevant regarding para. 2 of Article 5.

<sup>95</sup> See Case T-380/08, *Netherlands v Commission*, NYR, para. 48.

<sup>96</sup> See Case T-380/08, para. 43: *"Compte tenu de la nature des intérêts protégés dans le cadre d'une procédure d'application de l'article 81 CE, force est de considérer que la conclusion tirée au point précédent s'impose indépendamment de la question de savoir si la demande d'accès concerne une procédure déjà clôturée ou une procédure pendante. En effet, la publication des informations sensibles concernant les activités économiques des entreprises impliquées est susceptible de porter atteinte à leurs intérêts commerciaux, indépendamment de l'existence d'une procédure d'application de l'article 81 CE en cours. En outre, la perspective d'une telle publication après la clôture de cette procédure risquerait de nuire à la disponibilité des entreprises à collaborer lorsqu'une telle procédure est pendante"*.

<sup>97</sup> The issue is assessed differently when such a disclosure order is addressed to the parties to the infringement themselves and, thus, no further provisions should be included under this scenario.

authorities<sup>98</sup>. Moreover such a disclosure may be contrary to national provisions regarding professional secrecy (equivalent to Article 28 of Regulation 1/2003) and may run counter to the national rules regarding access to competition files<sup>99</sup>. Indeed, competition authorities are often bound by national legislation on professional secrecy.

*Paragraph 4:* This paragraph imposes a general obligation on national courts to protect confidential information from abuse. "Confidential information" which is also mentioned in paragraph 3 is not defined throughout the Article, but must be read in the context of Article 6 which provides specified limits on the disclosure for leniency corporate statements and settlement submissions (for further amendments suggested by the ELI see below). There may be a great difference across national legal systems between what information can be considered as "confidential" and what cannot. Therefore, Article 4 of the proposed Directive is very likely to be interpreted as a reference to the respective national law. If this is not the intention of the Directive, the term should be clarified further.

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<sup>98</sup> See Case T-380/08, para. 34: *"Dès lors, les exceptions relatives à la protection des intérêts commerciaux et à celle des objectifs des activités d'inspection, d'enquête et d'audit des institutions de l'Union sont, en l'espèce, étroitement liées"*. See also para. 39.

<sup>99</sup> See Case T-380/08, para. 40.



## Article 6

### *Limits on the disclosure of evidence from the file of a competition authority*

#### **Original text**

#### **Suggested wording**

1. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

(a) leniency corporate statements; and

(b) settlement submissions.

2. Member States shall ensure that, for the purpose of actions for damages, national courts can order the disclosure of the following categories of evidence only after a competition authority has closed its proceedings or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation No 1/2003:

(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;

(b) information that was drawn up by a competition authority in the course of its proceedings.

3. Disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in paragraphs 1 or 2 of this Article may be ordered in actions for damages at any time.

1. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

(a) leniency corporate statements;

(b) settlement submissions;

***(c) documents that reproduce statements or evidence contained in leniency corporate statements and settlement submissions;***

***(d) documents drafted up by competition authorities for internal use and necessary for the effective functioning of competition authorities, unless there is an overriding public interest in disclosure.***

*Comments:*

*Paragraph 1:* It is not clear whether this protection will be extended to material from leniency corporate statements that finds its way into other documents (such as responses to information requests). For that reason, consideration may be given to adding the types of documents proposed in suggested points (c) and (d)<sup>100</sup>, to those referred to in paragraph 1. The ELI suggests adopting a similar provision as included in Article 4 paragraph 3 of Regulation 1049/2001 to describe internal documents which should be exempt from disclosure in order to preserve the necessary “space-to-think” for an effective decision-making process.

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<sup>100</sup> For suggested point (c), see Case T-380/08, para. 60. For suggested point (d), see Case T-403/05, *MyTravel v Commission*, [2008], II-2027, para. 54, 94 and 96.

## Chapter III Effect of national decisions, limitation periods, joint and several liability

### Article 9

#### *Effect of national decisions*

##### Original text

Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty.

##### Suggested wording

Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts ***may determine the issues of damage and causation on the evidence before them, provided that they*** cannot take decisions running counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty.

#### *Comments:*

Article 16(1) of Regulation 1/2003, the main competition procedure regulation, provides that national courts may not take decisions running counter to European Commission competition infringement decisions. The Commission proposes extending this effect to final infringement decisions by NCAs or review courts both in the Member State of the NCA and all other Member States.

The Council has amended Article 9 to limit the binding effect of an NCA infringement decision to the national courts of the Member State of that NCA. Although there is still a debate on the basic question whether there should be at all a binding effect of competition authority decisions as this may interfere with the principle of separation of powers and judicial independence and particularly touch upon the balance of public and private enforcement<sup>101</sup>, the ELI supports the proposed Directive's approach. The ELI considers that the operative part of the decision finding a competition

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<sup>101</sup> See A. Komninos, "Private Enforcement in the EU with Emphasis on Damages Actions", in D. Geradin and I. Lianos (eds.), *Research Handbook on European Competition Law*, Edward Elgar Publishers, 2013, p. 228; "EU Private Antitrust Enforcement: Indirect Purchaser Standing and Passing-on in Light of the *acquis communautaire*", *I rimedi civilistici agli illeciti anticoncorrenziali, Private Enforcement of Competition Law*, Atti del III Convegno di Studio tenuto presso la Facoltà di Giurisprudenza di Trento, 15-16 aprile 2011, Gian Antonio Benacchio & Michele Carpagnano (Eds.), CEDAM, Padua, 2012, p. 161-181.

law infringement should be binding on the national courts of all Member States in the interests of consistency regarding the legal effect of infringement decisions of all members of the European Competition Network, and not just those of the European Commission, ultimately in the interest of legal certainty<sup>102</sup>.

Therefore, the ELI would in principle support the proposal to give binding effect to the finding of infringement in NCA decisions provided that this does not give binding effect to any findings of fact which relate to the issues of damage or causation.

The ELI believes that the Commission's wording "*...those courts cannot take decisions running counter to such finding of an infringement*" is intended to limit the binding effect of any NCA decision in the way desired. However, this could be clarified. The clarification can be made either in a recital or in Article 9 of the proposed Directive itself. The text of Article 9 could for example be changed to a positive wording by making clear that the binding effect is limited to the declaration made by national competition authorities or by a review court with respect to the violation of competition rules. Another option, which is favoured by the ELI, is to make a clarification by making it explicit that the national court hearing the case has the power to find the facts relating to the issues of damage and causation: "*... those courts may determine the issues of damage and causation on the evidence before them, provided that they cannot take decisions running counter to such finding of an infringement*".

It would also be worth clarifying whether, as a matter of EU law, findings of infringement of competition law contained in decisions of NCAs and national courts of one Member State are binding on national courts having their seat in a different Member State.

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<sup>102</sup> An example for such a binding effect in national law is provided by Article 33 paragraph 4 of the German Antitrust Act. The binding effect is explicitly limited to the declaration of a violation of national antitrust rules or Articles 101, 102 TFEU.

## Article 10

### Limitation periods

#### Original text

#### Suggested wording

1. Member States shall lay down the rules applicable to limitation periods for bringing actions for damages in accordance with this Article. Those rules shall determine when the limitation period begins to run, the duration of the period and the circumstances under which the period can be interrupted or suspended.

No amendment is suggested.

2. Member States shall ensure that the limitation period shall not begin to run before an injured party knows, or can reasonably be expected to have knowledge of:

- (i) the behaviour constituting the infringement;
- (ii) the qualification of such behaviour as an infringement of Union or national competition law;
- (iii) the fact that the infringement caused harm to him; and
- (iv) the identity of the infringer who caused such harm.

3. Member States shall ensure that the limitation period does not begin to run before the day on which a continuous or repeated infringement ceases.

4. Member States shall ensure that the limitation period for bringing an action for damages is at least five years.

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or the proceedings are otherwise terminated.

#### *Comments:*

The ELI endorses the wording of Article 10 in the proposed Directive in its entirety. There have been some discussions with regard to the mandatorily set subjective trigger of the limitation periods, without the possibility of an objective limitation to a certain number of years from the infringement. After considering the introduction of an objectively set long stop date, the ELI ultimately decided to endorse Article 10 in the form suggested by the European Commission.

The ELI welcomes the introduction of a minimum length of limitation periods for damages claims on the basis of competition law infringements in Article 10(4) for a number of reasons. First and

foremost, introducing a minimum length will significantly improve access to justice for victims of competition law infringements. Some Member States currently have limitation periods that are so short that on the one hand a considerable part of legitimate claims will never be brought before courts, and on the other hand, they may lead to claimants bringing insufficiently prepared claims solely to interrupt the limitation periods. Secondly, it has been argued that too short limitation periods, such as the one proposed by the Council, will lead to fewer settlements, and unnecessary litigation, as the length of the limitation period forces parties to litigate matters that they would normally have been able to settle commercially.

## Chapter IV Passing-on of overcharges

### Article 12

#### Passing-on defence

##### Original text

##### Suggested wording

1. Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proving that the overcharge was passed on shall rest with the defendant.

2. Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph.

**2. *This paragraph should be deleted or reformulated to define the conditions for a claim to be legally impossible.***

#### Comments:

Considering Article 12(2) of the proposed Directive, on the one hand, it is difficult to evaluate what the definition of a "legal impossibility" would be. This term, which has different meanings in different legal systems and hence hampers harmonisation, is particularly confusing in the context of passing-on. Moreover, legal obstacles which would make it "legally impossible" for indirect customers to claim compensation for the harm they have suffered would violate the CJEU's case law established in the *Courage* and *Manfredi* judgments. Finally, even if the drafters probably had causation in their minds when they proposed Article 12(2), one should not forget that causation can only be established on an *ad hoc* basis. Therefore, it would be highly questionable to elevate an *ad hoc* result to a general condition for the admissibility of a defence. For these reasons, one could argue that Article 12(2) should be deleted.

On the other hand, however, even in the light of the *Courage* and *Manfredi* judgments, there will be cases where indirect customers cannot claim damages e.g. because of lapse of the limitation period or for reasons of causation, provided the relevant national rules are in line with the principles of equivalence and effectiveness. In such cases, deleting Article 12(2) and allowing the defendant to invoke the passing-on defence would mean that the defendant gets away without having to pay any damages even where all elements of the direct customer's claim are fulfilled. This result would be very questionable.

## Article 13

### Indirect purchasers

#### Original text

#### Suggested wording

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether — or to what degree — an overcharge was passed on to the claimant, the burden of proving the existence and scope of such pass-on shall rest with the claimant.

2. In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:

- (a) the defendant has committed an infringement of competition law;
- (b) the infringement resulted in an overcharge for the direct purchaser of the defendant; and
- (c) he purchased the goods or services that were the subject of the infringement, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.

3. Member States shall ensure that the court has the power to estimate which share of that overcharge was passed on.

4. This paragraph shall be without prejudice to the infringer's right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser.

***1. Where an indirect purchaser claims compensation with regard to an infringement leading to overcharge, a passing-on of overcharge impacting the price of the goods or services purchased shall be deemed to have been proven, provided that these are the same goods or services that were subject to the infringement, or goods or services derived from or containing the goods or services that were the subject of the infringement.***

***2. This paragraph should be deleted.***

3. No amendment was suggested.

**4.** This **Article** shall be without prejudice to the **defendant's** right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser.

#### Comments:

Even if it is deemed necessary to explicitly allow passing-on defences, one of the most intriguing questions in the private enforcement of competition law is whether it does follow therefrom that one would have to encourage or facilitate the possibility for indirect purchasers to claim compensation. On the one hand, without mechanisms which would facilitate indirect purchasers' claims, there is a clear risk that infringers will keep hold of their illegal gains. On the other hand, facilitating the task of indirect purchasers who want to claim damages will give rise to a fair amount of litigation.



While stating that there is some risk that the infringer maintains his illegal gains because the passing-on of the overcharge is difficult to prove, in its White Paper the European Commission recommends that the indirect purchaser should be able to rely on a rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level. Since, given their distance from the infringement, indirect purchasers are in a difficult position to produce sufficient proof of the existence and extent of the passing-on of the illegal overcharge along the distribution chain<sup>103</sup>, the ELI finds it appropriate to establish a rebuttable presumption in favour of the indirect purchaser as well. It is worth mentioning that, in its communication of 3 December 2013, the EU Council has reached a similar solution.

Besides, the CJEU's as well as some Member States' case laws lend support to the proposition that indirect purchasers should be able to sue. Particularly the CJEU's case law should be interpreted in light of the effectiveness principle. The latter allows for the adoption of measures aimed at ensuring an effective enforcement, such as eliminating the obstacles that indirect purchasers face when exercising their right to damages.

The infringer should be allowed to bring proof showing that the actual loss has not been passed on or has not been passed on entirely.

#### *The need for transnational rules aiming at governing consolidated actions in cross-border cases*

The White Paper and the accompanying staff working paper propose procedural measures to avoid contradicting results in multiple proceedings by claimants who are at different levels of the distribution chain (e.g. direct purchasers, indirect purchasers). Hence, an innovative alternative solution to prove the passing-on that falls upon an indirect purchaser can be developed by way of a procedural framework.

Particularly for cross-border cases, there is a need to establish transnational rules which would allow joining direct and indirect purchasers in one legal action (consolidated action). At EU level, consolidating the claims of all injured parties into a single proceeding, designating a lead claimant, and then allocating damages to participating parties would:

1. expand compensation to all parties, including indirect purchasers, that claim and demonstrate harm, and secure compensation for all injured parties;
2. reduce litigation complexity and its associated administrative costs by eliminating parallel litigation and forcing all causes of action into one suit;
3. eliminate the risk that cartel members might face excessive liability where they lose a legal action against a direct purchaser and are later again sued by indirect purchasers.

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<sup>103</sup> On which see E. Büyüksagis, "New Perspectives on Misuse of Market Power: How Should the Effects-based Approach Complement the Existing Normative Solution", *Swiss Review of Business Law* 2013, p. 49, 67.

Since the interests of direct and indirect purchasers may be disparate, the procedural mechanism that ultimately can be implemented should allow to subdivide the group, e.g. along the various levels of the distribution chain, and to provide for separate representation of each of the subgroups where their interests clash. However, the procedural framework needed to achieve these goals will be rather complex and it must be consistent with the implementation of general rules of collective redress. Therefore it is a task for the future to develop these rules at the European level. The European Commission should take this into account when revisiting the Recommendation on instruments of collective redress in four years.

## I

*(Legislative acts)*

## DIRECTIVES

**DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL****of 26 November 2014****on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union****(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Acting in accordance with the ordinary legislative procedure <sup>(2)</sup>,

Whereas:

- (1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union in order to ensure that competition in the internal market is not distorted.
- (2) The public enforcement of Articles 101 and 102 TFEU is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003 <sup>(3)</sup>. Upon the entry into force of the Treaty of Lisbon on 1 December 2009, Articles 81 and 82 of the Treaty establishing the European Community became Articles 101 and 102 TFEU, and they remain identical in substance. Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation (EC) No 1/2003. In accordance with that Regulation, Member States should be able to designate administrative as well as judicial authorities to apply Articles 101 and 102 TFEU as public enforcers and to carry out the various functions conferred upon competition authorities by that Regulation.
- (3) Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers

<sup>(1)</sup> OJ C 67, 6.3.2014, p. 83.

<sup>(2)</sup> Position of the European Parliament of 17 April 2014 (not yet published in the Official Journal) and decision of the Council of 10 November 2014.

<sup>(3)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. The right to compensation in Union law applies equally to infringements of Articles 101 and 102 TFEU by public undertakings and by undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 TFEU.

- (4) The right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law.
- (5) Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.
- (6) To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market.
- (7) In accordance with Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There are marked differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right. As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate.
- (8) Undertakings established and operating in various Member States are subject to differing procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively. As the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal bases of Articles 103 and 114 TFEU.
- (9) It is necessary, bearing in mind that large-scale infringements of competition law often have a cross-border element, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market. It is appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law. An approximation of those rules will help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases.
- (10) Article 3(1) of Regulation (EC) No 1/2003 provides that '[w]here the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].' In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying differing rules on civil liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national competition law which must be applied in the same cases in parallel to Union competition law would otherwise adversely affect the position of

claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market. This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU.

- (11) In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions. Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.
- (12) This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.
- (13) The right to compensation is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. Without prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.
- (14) Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.
- (15) Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. Where a national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003 as regards requests for information apply. Where national courts order public authorities to disclose evidence, the principles of legal and administrative cooperation under Union or national law apply.

- (16) National courts should be able, under their strict control, especially as regards the necessity and proportionality of disclosure measures, to order the disclosure of specified items of evidence or categories of evidence upon request of a party. It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Where a request for disclosure aims to obtain a category of evidence, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.
- (17) Where a court in one Member State requests a competent court in another Member State to take evidence or requests that evidence be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 <sup>(1)</sup> apply.
- (18) While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.
- (19) This Directive affects neither the possibility under the laws of the Member States to appeal disclosure orders, nor the conditions for bringing such appeals.
- (20) Regulation (EC) No 1049/2001 of the European Parliament and of the Council <sup>(2)</sup> governs public access to European Parliament, Council and Commission documents, and is designed to confer on the public as wide a right of access as possible to documents of those institutions. That right is nonetheless subject to certain limits based on reasons of public or private interest. It follows that the system of exceptions laid down in Article 4 of that Regulation is based on a balancing of the opposing interests in a given situation, namely, the interests which would be favoured by the disclosure of the documents in question and those which would be jeopardised by such disclosure. This Directive should be without prejudice to such rules and practices under Regulation (EC) No 1049/2001.
- (21) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union on the disclosure of evidence that is included in the file of a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority. This Directive does not cover the disclosure of internal documents of, or correspondence between, competition authorities.
- (22) In order to ensure the effective protection of the right to compensation, it is not necessary that every document relating to proceedings under Article 101 or 102 TFEU be disclosed to a claimant merely on the grounds of the claimant's intended action for damages since it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to those proceedings.
- (23) The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions', i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.

<sup>(1)</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).

<sup>(2)</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

- (24) This Directive does not affect the right of courts to consider, under Union or national law, the interests of the effective public enforcement of competition law when ordering the disclosure of any type of evidence with the exception of leniency statements and settlement submissions.
- (25) An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of Union or national competition law and sent to the parties to those proceedings (such as a 'Statement of Objections') or prepared by a party thereto (such as replies to requests for information of the competition authority or witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 or under Chapter III of Regulation (EC) No 1/2003, with the exception of decisions on interim measures.
- (26) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. That exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents. Those limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law. In order to ensure that that exemption does not unduly interfere with injured parties' rights to compensation, it should be limited to those voluntary and self-incriminating leniency statements and settlement submissions.
- (27) The rules in this Directive on the disclosure of documents other than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages. National courts should themselves be able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements and settlement submissions laid down in this Directive. Any content falling outside those definitions should be disclosable under the relevant conditions.
- (28) National courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority ('pre-existing information').
- (29) The disclosure of evidence should be ordered from a competition authority only when that evidence cannot reasonably be obtained from another party or from a third party.
- (30) Pursuant to Article 15(3) of Regulation (EC) No 1/2003, competition authorities, acting upon their own initiative, can submit written observations to national courts on issues relating to the application of Article 101 or 102 TFEU. In order to preserve the contribution made by public enforcement to the application of those Articles, competition authorities should likewise be able, acting upon their own initiative, to submit their observations to a national court for the purpose of assessing the proportionality of a disclosure of evidence included in the authorities' files, in light of the impact that such disclosure would have on the effectiveness of the public enforcement of competition law. Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information when the person requesting disclosure or the person from whom disclosure is sought is involved in that competition authority's investigation into the alleged infringement, without prejudice to national law providing for *ex parte* proceedings.

- (31) Any natural or legal person that obtains evidence through access to the file of a competition authority should be able to use that evidence for the purposes of an action for damages to which it is a party. Such use should also be allowed on the part of any natural or legal person that succeeded in its rights and obligations, including through the acquisition of its claim. Where the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 TFEU, other legal persons belonging to the same undertaking should also be able to use that evidence.
- (32) However, the use of evidence obtained through access to the file of a competition authority should not unduly detract from the effective enforcement of competition law by a competition authority. In order to ensure that the limitations on disclosure laid down in this Directive are not undermined, the use of evidence of the types referred to in recitals 24 and 25 which is obtained solely through access to the file of a competition authority should be limited under the same circumstances. The limitation should take the form of inadmissibility in actions for damages or the form of any other protection under applicable national rules capable of ensuring the full effect of the limits on the disclosure of those types of evidence. Moreover, evidence obtained from a competition authority should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors. That limitation to avoid trading of evidence does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.
- (33) The fact that a claim for damages is initiated, or that an investigation by a competition authority is started, entails a risk that persons concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties. In so far as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective penalty, and can help avoid delays. Penalties should also be available for non-compliance with obligations to protect confidential information and for the abusive use of information obtained through disclosure. Similarly, penalties should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages.
- (34) Ensuring the effective and consistent application of Articles 101 and 102 TFEU by the Commission and the national competition authorities necessitates a common approach across the Union on the effect of national competition authorities' final infringement decisions on subsequent actions for damages. Such decisions are adopted only after the Commission has been informed of the decision envisaged or, in the absence thereof, of any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation (EC) No 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of that Regulation. The Commission should ensure the consistent application of Union competition law by providing, bilaterally and within the framework of the European Competition Network, guidance to the national competition authorities. To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.
- (35) Where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the national competition authority or the review court to a national court as at least *prima facie* evidence of the fact that an infringement of competition law has occurred. The finding can be assessed as appropriate, along with any other evidence adduced by the parties. The effects of decisions by national competition authorities and review courts finding an infringement of the competition rules are without prejudice to the rights and obligations of national courts under Article 267 TFEU.



- (36) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon a finding by a competition authority or a review court of an infringement. To that end, it should be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. The limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behaviour constituting the infringement, the fact that the infringement caused the claimant harm and the identity of the infringer. Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.
- (37) Where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.
- (38) Undertakings which cooperate with competition authorities under a leniency programme play a key role in exposing secret cartel infringements and in bringing them to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity, thus potentially making the immunity recipient the preferential target of litigation. It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make vis-à-vis co-infringers not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel. That share should be determined in accordance with the same rules used to determine the contributions between infringers. The immunity recipient should remain fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.
- (39) Harm in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated. It is therefore in principle appropriate to allow an infringer to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer, in so far as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge. This burden of proof should not affect the possibility for the infringer to use evidence other than that in its possession, such as evidence already acquired in the proceedings or evidence held by other parties or third parties.
- (40) In situations where the passing-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.
- (41) Depending on the conditions under which undertakings are operating, it may be commercial practice to pass on price increases down the supply chain. Consumers or undertakings to whom actual loss has thus been passed on have suffered harm caused by an infringement of Union or national competition law. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm. It is therefore appropriate to provide that, where the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, the latter is regarded as having proven that an overcharge paid by that direct purchaser has

been passed on to its level where it is able to show *prima facie* that such passing-on has occurred. This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such *prima facie* proof. As regards the quantification of passing-on, national courts should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in disputes pending before them.

- (42) The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.
- (43) Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.
- (44) Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from related proceedings and hence to avoid the harm caused by the infringement of Union or national competition law not being fully compensated or the infringer being required to pay damages to compensate for harm that has not been suffered, national courts should have the power to estimate the proportion of any overcharge which was suffered by the direct or indirect purchasers in disputes pending before them. In this context, national courts should be able to take due account, by procedural or substantive means available under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level. Such means should also be available in cross-border cases. This possibility to take due account of judgments should be without prejudice to the fundamental rights of the defence and the rights to an effective remedy and a fair trial of those who were not parties to the judicial proceedings, and without prejudice to the rules on the evidentiary value of judgments rendered in that context. It is possible for actions pending before the courts of different Member States to be considered as related within the meaning of Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council <sup>(1)</sup>. Under that Article, national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction. This Directive is without prejudice to the rights and obligations of national courts under that Regulation.
- (45) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation.
- (46) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State to determine its own rules on quantifying harm, and for the Member States and for the national courts to determine what requirements the claimant has to meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements. However, the requirements of national law regarding the quantification of harm in competition law cases should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to ensure that national courts have the power to estimate the amount of the harm caused

<sup>(1)</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

by the competition law infringement. Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability, the Commission should provide general guidance at Union level.

- (47) To remedy the information asymmetry and some of the difficulties associated with quantifying harm in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.
- (48) Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.
- (49) Limitation periods for bringing an action for damages could be such that they prevent injured parties and infringers from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both sides with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts, limitation periods need to be suspended for the duration of the consensual dispute resolution process.
- (50) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages for the same claim has been brought before a national court, that court should be able to suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the advantages of an expeditious procedure.
- (51) To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to its non-settling co-infringers when the latter have paid damages to an injured party with whom the first infringer had previously settled. The corollary to this non-contribution rule is that the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. That relative share should be determined in accordance with the rules otherwise used to determine the contributions among infringers. Without such a reduction, non-settling infringers would be unduly affected by settlements to which they were not a party. However, in order to ensure the right to full compensation, settling co-infringers should still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim. The remaining claim refers to the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party. The latter possibility to claim damages from the settling co-infringer exists unless it is expressly excluded under the terms of the consensual settlement.
- (52) Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement. Therefore, when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.

- (53) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.
- (54) Since the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers, cannot be sufficiently achieved by the Member States, but can rather, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 TFEU, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (55) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents <sup>(1)</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (56) It is appropriate to provide rules for the temporal application of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

#### CHAPTER I

### SUBJECT MATTER, SCOPE AND DEFINITIONS

#### *Article 1*

#### **Subject matter and scope**

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.
2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.

#### *Article 2*

#### **Definitions**

For the purposes of this Directive, the following definitions apply:

- (1) 'infringement of competition law' means an infringement of Article 101 or 102 TFEU, or of national competition law;
- (2) 'infringer' means an undertaking or association of undertakings which has committed an infringement of competition law;
- (3) 'national competition law' means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced;
- (4) 'action for damages' means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;
- (5) 'claim for damages' means a claim for compensation for harm caused by an infringement of competition law;
- (6) 'injured party' means a person that has suffered harm caused by an infringement of competition law;

<sup>(1)</sup> OJ C 369, 17.12.2011, p. 14.

- (7) 'national competition authority' means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003, as being responsible for the application of Articles 101 and 102 TFEU;
- (8) 'competition authority' means the Commission or a national competition authority or both, as the context may require;
- (9) 'national court' means a court or tribunal of a Member State within the meaning of Article 267 TFEU;
- (10) 'review court' means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law;
- (11) 'infringement decision' means a decision of a competition authority or review court that finds an infringement of competition law;
- (12) 'final infringement decision' means an infringement decision that cannot be, or that can no longer be, appealed by ordinary means;
- (13) 'evidence' means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;
- (14) 'cartel' means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;
- (15) 'leniency programme' means a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel;
- (16) 'leniency statement' means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information;
- (17) 'pre-existing information' means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;
- (18) 'settlement submission' means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;
- (19) 'immunity recipient' means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency programme;
- (20) 'overcharge' means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law;
- (21) 'consensual dispute resolution' means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;
- (22) 'consensual settlement' means an agreement reached through consensual dispute resolution.
- (23) 'direct purchaser' means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law;
- (24) 'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.

*Article 3***Right to full compensation**

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.
2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.
3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

*Article 4***Principles of effectiveness and equivalence**

In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.

## CHAPTER II

**DISCLOSURE OF EVIDENCE***Article 5***Disclosure of evidence**

1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.
3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:
  - (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
  - (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;
  - (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.
4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

5. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.
6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.
7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.
8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

#### *Article 6*

##### **Disclosure of evidence included in the file of a competition authority**

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.
2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.
3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.
4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:
  - (a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;
  - (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and
  - (c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.
5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:
  - (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
  - (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
  - (c) settlement submissions that have been withdrawn.
6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:
  - (a) leniency statements; and
  - (b) settlement submissions.
7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.
8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

#### *Article 7*

##### **Limits on the use of evidence obtained solely through access to the file of a competition authority**

1. Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

2. Member States shall ensure that, until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Article 6(5) which is obtained by a natural or legal person solely through access to the file of that competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority and which does not fall under paragraph 1 or 2, can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

#### *Article 8*

##### **Penalties**

1. Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:

- (a) their failure or refusal to comply with the disclosure order of any national court;
- (b) their destruction of relevant evidence;
- (c) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;
- (d) their breach of the limits on the use of evidence provided for in this Chapter.

2. Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties available to national courts shall include, with regard to the behaviour of a party to proceedings for an action for damages, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.

#### CHAPTER III

##### **EFFECT OF NATIONAL DECISIONS, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY**

#### *Article 9*

##### **Effect of national decisions**

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.



2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.
3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

#### Article 10

##### Limitation periods

1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.
2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
  - (a) of the behaviour and the fact that it constitutes an infringement of competition law;
  - (b) of the fact that the infringement of competition law caused harm to it; and
  - (c) the identity of the infringer.
3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.
4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

#### Article 11

##### Joint and several liability

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.
2. By way of derogation from paragraph 1, Member States shall ensure that, without prejudice to the right of full compensation as laid down in Article 3, where the infringer is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC <sup>(1)</sup>, the infringer is liable only to its own direct and indirect purchasers where:
  - (a) its market share in the relevant market was below 5 % at any time during the infringement of competition law; and
  - (b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.
3. The derogation laid down in paragraph 2 shall not apply where:
  - (a) the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or
  - (b) the SME has previously been found to have infringed competition law.
4. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable as follows:
  - (a) to its direct or indirect purchasers or providers; and
  - (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

Member States shall ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions.

<sup>(1)</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

5. Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

6. Member States shall ensure that, to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.

#### CHAPTER IV

### THE PASSING-ON OF OVERCHARGES

#### Article 12

#### **Passing-on of overcharges and the right to full compensation**

1. To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided.
2. In order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.
3. This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.
4. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to a supply to the infringer.
5. Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.

#### Article 13

#### **Passing-on defence**

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

#### Article 14

#### **Indirect purchasers**

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.
2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:
  - (a) the defendant has committed an infringement of competition law;
  - (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
  - (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

#### *Article 15*

##### **Actions for damages by claimants from different levels in the supply chain**

1. To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, Member States shall ensure that in assessing whether the burden of proof resulting from the application of Articles 13 and 14 is satisfied, national courts seized of an action for damages are able, by means available under Union or national law, to take due account of any of the following:

- (a) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain;
- (b) judgments resulting from actions for damages as referred to in point (a);
- (c) relevant information in the public domain resulting from the public enforcement of competition law.

2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

#### *Article 16*

##### **Guidelines for national courts**

The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.

#### CHAPTER V

##### **QUANTIFICATION OF HARM**

#### *Article 17*

##### **Quantification of harm**

1. Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.

2. It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption.

3. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

#### CHAPTER VI

##### **CONSENSUAL DISPUTE RESOLUTION**

#### *Article 18*

##### **Suspensive and other effects of consensual dispute resolution**

1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.

2. Without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages.

3. A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.

#### *Article 19*

##### **Effect of consensual settlements on subsequent actions for damages**

1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party.
2. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.
3. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer.

The derogation referred to in the first subparagraph may be expressly excluded under the terms of the consensual settlement.

4. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

#### CHAPTER VII

##### **FINAL PROVISIONS**

#### *Article 20*

##### **Review**

1. The Commission shall review this Directive and shall submit a report thereon to the European Parliament and the Council by 27 December 2020.
2. The report referred to in paragraph 1 shall, inter alia, include information on all of the following:
  - (a) the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law;
  - (b) the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of competition law has occurred;
  - (c) the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of competition law or suffered at any level of the supply chain.
3. If appropriate, the report referred to in paragraph 1 shall be accompanied by a legislative proposal.

#### *Article 21*

##### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 22***Temporal application**

1. Member States shall ensure that the national measures adopted pursuant to Article 21 in order to comply with substantive provisions of this Directive do not apply retroactively.
2. Member States shall ensure that any national measures adopted pursuant to Article 21, other than those referred to in paragraph 1, do not apply to actions for damages of which a national court was seized prior to 26 December 2014.

*Article 23***Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 24***Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 26 November 2014.

*For the European Parliament*  
*The President*  
M. SCHULZ

*For the Council*  
*The President*  
S. GOZI

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